S. HRG. 109–1038

HABEAS CORPUS PROCEEDINGS AND ISSUES OF ACTUAL INNOCENCE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

JULY 13, 2005

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WEDNESDAY, JULY 13, 2005

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:32 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Kyl, DeWine, Sessions, Leahy, and Feinstein.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. We will proceed with the Judiciary Committee hearing on habeas corpus proceedings and issues of actual innocence. We are going to be taking up a variety of subjects today on the very important question of the death penalty. Legislation has been introduced by Senator Kyl, jointly with Senators Hatch, Grassley, Chambliss, and Cornyn, which would tighten the time requirements, something that has been done back in 1996, but there is a concern about the very, very lengthy delays in the habeas corpus proceedings, which run as long as 10, 15, or even 20 years of litigation. And at the same time, the Committee will be taking up the issues of actual innocence cases, where the Supreme Court has granted cert on a case which will test whether a claim of actual innocence will warrant review in *House* v. *Bell*.

The whole issue of the death penalty is obviously a very complex one which our society has been struggling with for a very, very long time. I personally believe the death penalty is a deterrent, but to hear articulated the proposition of law that it is not unconstitutional to execute an innocent person so long as procedural due process has been followed candidly shocks me. I think that is an unacceptable articulation of law.

I do not have any magic formula as to how we will eliminate all error, but we ought to be working at it a lot harder than we are at the present time. When I was District Attorney of Philadelphia—and I do not want to tell too many old war stories—we had 500 homicides a year, and I would not permit any of my assistants to ask for the death penalty in a homicide case without my personal review. And my own experience suggests to me that there are cases which are being prosecuted where the death penalty is requested where the prosecutors are really not sure of their case,

really not sure of the conclusion of guilt. And I think if there is any lingering issue as to the issue of guilt, that is something the prosecutor has the duty to pull back on to be absolutely sure or as sure as he can be without going into the kinds of evidence which is tenuous and difficult.

So here we have a very complex issue where there are problems on both sides of the equation, enormous delays which ought to be precluded, but still at the same time to protect the innocence of people. And it is a little surprising to me, candidly, that the Supreme Court has not dealt with the DNA issue long ago. And Congress has the authority to deal with it, and we intend to do so.

Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. You know, it has been less than a decade since the Congress overhauled the Federal habeas corpus laws prior to the Antiterrorism and Effective Death Penalty Act of 1996, or AEDPA. That was a bipartisan compromise, but it severely narrowed the scope of habeas jurisdiction. For example, it imposed strict new time limits, procedural bar rules. I thought that AEDPA went too far at that time. It increased the risk that people were wrongfully convicted, could be left to rot in jail, and the nightmare scenario of an innocent person being executed could come to pass. Of course, others thought that it did not go far enough. Naturally, that is the nature of a compromise. We brought that compromise bill to the floor.

Now, during the floor debate on it, the distinguished Senator from Arizona offered an amendment to eliminate Federal habeas except in circumstances where the State's justice system had proved incapable of enforcing Federal constitutional rights. That position was rejected. In fact, several Republican members of this Committee voted against it. It was rejected by a heavy margin in the Senate.

Now, the habeas bill that is before the Committee, the so-called Streamlined Procedures Act, actually goes much further than the bipartisan compromise of AEDPA did. I will say more about that when we come to a markup, but I do not know what has happened that would justify unraveling that compromise made in the Senate. We will hear some anecdotal evidence about a case in which habeas proceedings have dragged on long after conviction, and I would urge consideration first and caution against any rash judgments. We should ask some questions before we legislate based on these stories, depending on what caused the delay. Is Federal habeas being abused, or most of the time was it taken up by State habeas or matters attributable to the individual States? And we should ask whether they are isolated instances or a systemic problem.

Habeas corpus has protected the constitutional rights and freedoms of all Americans throughout our history. It really is the Great Writ. It is a vital protection that we all rely upon.

Last October, after we took a closer look, last October, President Bush signed into law the Innocence Protection Act of 2004. We passed that with overwhelming bipartisan support, including Chairman Specter, former Chairman Hatch, Senator DeWine, and

others. We joined together on it, and we have to continue to work together to ensure that its funding promises do not go unfilled. It reflects what we learned about the administration of the death penalty over years of hearings in this Committee.

We learned that there is an unconscionably high rate of error in capital cases, errors so serious that it not only denies defendants their constitutional rights, it undermines the reliability of the verdict. We learned of sleeping lawyers, drunk lawyers, suspended lawyers, lawyers too overworked, underpaid, inexperienced, or indifferent to even meet with their clients. And they were defending in death penalty cases.

We learned that more than 100 people had been released from death row when it turned out they had the wrong person there. The modern miracle of DNA has helped, but that is only the tip of the iceberg. We have a number of those people who were wrongfully convicted here in the audience today. Kirk Bloodsworth is here. He and his wife are friends of my wife and me. But he was a young man who was just out of the Marines. He was arrested, convicted, and sentenced to death for a heinous crime, a terrible crime. The only thing is he did not commit it. DNA evidence ultimately freed him and identified the real killer. So I am proud to have come to know him and his wife, Brenda, through our work together on the Innocence Protection Act, which includes a program named in his honor.

Dennis Fritz spent 12 years serving a life sentence until he was finally able to prove his innocence through DNA testing. He testified before this Committee 5 years ago, and I am glad to see him back in the audience today.

Dell Hunt of North Carolina was convicted in 1984 for a murder he did not commit. He was freed 19 years later, in 2003, after DNA evidence ruled him out as a killer and, just as importantly, identified the true perpetrator of the crime, who then confessed.

I mention this because, you know, a lot of times we take a sense of comfort that we have locked somebody up. There has been a heinous crime, we have arrested somebody, we have locked him up, even convicted him, and we have a sense of safety. But if you have got the wrong person, that means that killer is still out there and could kill again. It is especially important in matters of serial murders or serial rapes, things like this.

Brandon Moon, convicted of rape in 1987, a law student at the University of Texas at El Paso, DNA testing cleared him of the crime just a few months ago, almost 20 years later, and then he was released with the apology of the district attorney. That does not give him back those 20 years of his life, but at least he has been released.

Thomas Goldstein, Gloria Killian, Joseph Estrich—all of them were granted Federal habeas relief after presenting substantial evidence of actual innocence. If S. 1088 were the law, they would still be wrongfully in prison.

So let there be no misunderstanding. If S. 1088 were the law, exonerees such as these who are in the audience today would still be wrongfully imprisoned or worse. That is what we have learned since AEDPA, and that lesson has involved saving innocent lives. It is what apparently convinced President Reagan's first appointee

to the Supreme Court, one of the strongest advocates of States rights in the history of the Court, that left without Federal scrutiny, State criminal justice systems may pose unacceptable risks.

In July of 2001, Justice O'Connor acknowledged in a widely reported speech the serious questions being raised about the administration of the death penalty. Her conclusion was chilling in its common-sense candor. The system may well be allowing some innocent defendants to be executed.

This week in St. Louis, they reopened a murder investigation, of course, 10 years after the man was executed for the crime.

You know, the bill before us would greatly increase the risk, as well as the risk of lesser but, nonetheless, life-shattering injustices. It would do so without any real evidence, anything beyond anecdotal evidence, that the new regime we enacted less than a decade ago to limit Federal habeas is not doing the job. AEDPA put together a large majority in the Congress as a result of a bipartisan compromise that is not broken, certainly not in the way this bill would presuppose. And there is no need to fix Federal habeas corpus by destroying it. That does not fix it.

If you want to do anything, let the administrative arm of the courts look at this and report back to us if they think there is a problem. But let's not rush through and remove the historic protection of habeas corpus based on some anecdotes or some concerns.

Thank you, Mr. Chairman. I know I went over time, but this is a matter of great importance, and I appreciate you letting me do that.

Chairman SPECTER. Your timing is fine, Senator Leahy. Thank you.

Customarily, it is just the Chairman and Ranking who open, but Senator Kyl is the author of the bill, and I will yield to you for an opening statement, Senator Kyl.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you very much, Mr. Chairman.

Let me make it clear that we are not going to fix habeas corpus by destroying it. I think the question that the distinguished Ranking Member raises is the appropriate question. What has changed in the last 9 years to cause us to revisit the statute? The answer is a lot has changed. Let me cite some statistics that I think reveal why we need to look at this now, 9 years later.

In the context of something that President Clinton said when he commented with regard to the 1996 Act, it should not take 8 or 9 years and three trips to the Supreme Court to finalize whether a person, in fact, was properly convicted or not. The sad fact is that after 9 years of this Act, we still have that situation pertaining in far too many cases.

Let's look at some of the backlog statistics, and these are from the Administrative Office of the Courts.

In fiscal year 1994, there were 13,359 Federal habeas petitions pending before the U.S. district courts, a condition that we decided required us to look into this to see if we could—to relieve the courts from that kind of burden, 13,300. But by fiscal year 2003, the last year for which data are available, that number had gone up by

nearly 10,000 petitions to 23,218 petitions pending. So today there are almost twice as many as there were just 9 years ago when we felt that we had a problem that we needed to deal with.

How about the courts of appeals? Same facts. Fiscal year 1994, 3,799 habeas petitions pending before U.S. courts of appeal. By 2003, that number, again, has nearly doubled to 7,025 petitions pending before the courts of appeals.

These delays and backlogs have had a dramatic impact on the administration of justice. Consider a comment before the June 30th hearing in the House Crime Subcommittee by Ronald Eisenberg, a deputy district attorney for Philadelphia. He testified, "In the last decade, the number of lawyers employed exclusively on habeas work in the Philadelphia D.A.'s office has increased 400 percent. It is very difficult for us to do our job if we have this many habeas petitions."

Now, I am not going to get into anecdotal evidence at this point. I will later. Suffice it to say that there are a lot of examples, and one that I am going to be talking about is Christy Ann Fornoff, who was murdered in Arizona. Her parents are still waiting for a final conclusion to the case 21 years after her death. The Congress has the authority to deal with this subject. Habeas corpus is a guarantee against being held without trial, against executive detention. But the United States courts of appeals and other courts have repeatedly held that Congress has the authority to put limitations on habeas corpus.

The Seventh Circuit concluded in the case of *Lynn* v. *Murphy*, "Any suggestion that the Constitution forbids every contraction of the Federal habeas power bestowed by Congress in 1885 and expanded by the 1948 and 1966 amendments is untenable."

Mr. Chairman, everybody agrees that it is important to protect innocents, and that is why in this legislation, at every point, this bill creates an exception for actual innocence claims to all procedural barriers, allowing these claims to go forward. There is no exception to that principle. Innocence claims always trump the procedural barriers. We want to make sure that an innocent person is not executed. And I would also note that the cases of actual innocence on death row are exceedingly rare. I would just note that of all of the cases that were analyzed in the hearing in the House of Representatives, only 36 were actual innocence cases on death row. And my office has further analyzed those and found that 30 of those cases were resolved in State court proceedings. So only six of those cases even reached habeas review, and none of those would have been obviated by the legislation that we propose now. And I would note that of the anecdotes cited by the distinguished Ranking Member, none of those would have been adversely affected by our legislation today.

So I urge my colleagues in considering this legislation to connect up any concerns you have with the actual provisions of our bill. See how it works. It does not work the way some people have alleged that it works. We always provide the innocence claim, and I believe that as a result of the tightening up of some loopholes that have evolved over the years since the 1996 law was adopted, we can try to get back to a manageable case load of habeas petitions without

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doing any injustices whatsoever. And I am hoping that our hearing today will enlighten us further on that process.

Again, Mr. Chairman, thank you very much for holding this hearing so promptly.

Chairman SPECTER. Thank you very much, Senator Kyl.

Senator Feinstein or Senator DeWine, would either of you like to make an opening comment?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. The only thing I would like to say, Mr. Chairman, is I think this is a very big bill, and I was on the Committee when we did the prior habeas bill. And I did not realize that the numbers, the pendings, had gone up as they are. I had been under the impression that there was a decline. There is a letter that we have received from the Federal Public Defender which so states. So I think there are a lot of things that I need to reconcile. I am particularly interested to hear the witnesses on this point.

My own view is that an individual should have a timely habeas appeal and that the State appeal should be exhausted before there is the Federal appeal, but that should all be carried out within a given period of time.

I listened with interest to what the Ranking Member had to say, and I think whatever we do, we have to make it available, particularly for the innocent or some unusual claim.

So I would be very interested to hear what the witnesses have to say here today.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator DeWine.

Senator KYL. Mr. Chairman, might I just ask unanimous consent to put two things in the record: my full statement and a statement from Congressional Research that has the exact statistics which Senator Feinstein just—

Chairman SPECTER. Without objection, they will be made a part of the record.

[The prepared statement of Senator Kyl appears as a submission for the record.]

Chairman SPECTER. Senator DeWine.

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Mr. Chairman, I just thank you for holding the hearing, and I am looking forward to hearing our witnesses.

Senator LEAHY. Mr. Chairman, if I might note, Senator Feingold wanted to be here, but he is, of course, out in Wisconsin for the funeral of our former colleague, Senator Gaylord Nelson of Wisconsin. He will have a statement later to be included in the record with your permission.

Chairman SPECTER. Thank you, Senator Leahy. It might also be worth noting that Senator Feingold was one of those requesting the hearing today, and the bill had been on—it will be the third time on Thursday. First we did not have a quorum, and next it was carried over. And it is a complicated subject, and we will give it due consideration in Committee.

Our first witness is Mr. Tom Dolgenos, Assistant District Attorney in Philadelphia. He has been there since 1994. That is a good career prosecutor. Magna cum laude from Brown, 1984, and J.D. from Yale in 1990. When I was D.A. of Philadelphia, we did not have many people with your credentials. I am glad to see you there, and I am glad to see you there for such a long time.

Just a 20-second personal aside, people frequently ask me—they probably ask Senator Leahy, too—"What was your best job? Was it D.A., Senator?" I say, "No; Assistant D.A." So enjoy it while you have it, Tom.

Thank you for joining us, and we look forward to your testimony.

STATEMENT OF THOMAS DOLGENOS, CHIEF, FEDERAL LITIGATION UNIT, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PENNSYLVANIA

Mr. DOLGENOS. Thank you, Mr. Chairman and members of the Committee. I am an assistant district attorney in Philadelphia. It is my job, and the job of the other lawyers in my unit, to respond to hundreds of habeas corpus petitions each year. We are on the front lines, and I believe there are some real problems in the habeas system that have recently grown worse, despite the enactment of habeas reforms in 1996. I also believe, however, that the proposed Streamlined Procedures Act contains carefully crafted, common-sense responses to some of the worst abuses we commonly face.

I also want to emphasize that these problems are not limited to death penalty cases. On the contrary, they apply across the board, to all of the convictions that reach the Federal habeas stage—murder, rape, robberies, and other violent crimes. Only a small percentage of these cases involve the death penalty, and the Act would help protect the rights of victims and encourage the fair and effective use of the criminal justice system in all of these cases.

Perhaps the most familiar problem in habeas litigation is delay. We see this every day. Criminals who were convicted 5, 10, or 20 years ago continue to complain about their trials and raise new claims. The facts are endlessly re-litigated, and the process goes on and on.

Now, there are many costs associated with delay. The victims pay a heavy emotional cost, of course, because they and their families must relive the crimes again and again, without any closure or sense of justice. The States also bear the cost of delay because we have to pay for prosecutions that never really end. To take a small example—and Senator Kyl mentioned this statistic before—in the past 5 years, the number of attorneys in my office who are assigned as full-time habeas attorneys has increased by 400 percent.

The public also bears the cost of delay, both because it is expensive to support drawn-out litigation and because time itself dilutes the effectiveness of the criminal justice system. Deterrence works best when punishment is swift and sure; and when the process is open-ended and nothing ever seems final, the system breaks down.

I want to emphasize one other important point: The truth itself is a casualty of delay. As years pass, memories fade. Evidence is lost. Witnesses who were once sure cannot remember everything. Other witnesses disappear. Some witnesses who never wanted to

get involved in the first place are extremely reluctant to testify again years later. In fact, the longer the process goes on, the more opportunities exist for witness tampering and intimidation. After all, police and judges cannot protect witnesses forever, and too often a "recantation"—or other new evidence—is simply the product of coercion or foul play.

One recent example from our office makes the point. This prisoner had repeatedly molested and raped a girl when she was only 5 and 6 years old, and about 15 years later, he presented the Federal district court with the victim's alleged recantation, but it was ambiguously worded. When we investigated, the victim, now a young woman, told us that the defense investigator had misled her. This investigator had not clearly identified herself as a member of the defense team. She had urged the victim to sign the statement while assuring her that the assailant would remain in prison. And the statement, written by the defense team, had been worded just ambiguously enough to make it sound as if her attacker had not committed rape, when, in fact, he had. The victim was mortified when we told her that she had signed a defense-prepared affidavit that was designed to get this man out of prison. The prisoner's strategy had been to create evidence to qualify under the actual innocence standard; otherwise, his claims were barred.

Now, we were finally able to convince the district court in that case that this new evidence should at least be examined first by the State court, and the habeas petition is now stayed pending a State court hearing. But in the meantime, the victim has been dragged back into this case. And the point is that the passage of time, repetitive hearings, and re-litigation of guilt do not increase reliability. They can discourage witnesses from coming forward in the first place, and they can punish those who do. And because Federal habeas courts are so far removed in space and time from the crime, from the subtleties of State proceedings, and from the victims, it is all too easy to create claims as the years pass.

The only way to restore balance is by Federal statute, a statute that makes deadlines meaningful and prevents the litigation of new claims. And that is why I support the reforms contained in the Streamlined Procedures Act.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Dolgenos appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Dolgenos.

Our next witness is Professor Barry Scheck, Clinical Professor of Law at Cardozo School of Law, co-founder and the current Director of the Innocence Project, started in 1991, which has exonerated, according to the information provided to me, some 150 people since its creation, recognized as a DNA expert on the O.J. Simpson defense team, and has been in various other high-profile cases.

Thank you for coming in, Professor Scheck, and we look forward to your testimony.

STATEMENT OF BARRY C. SCHECK, CO-DIRECTOR, INNOCENCE PROJECT, AND PROFESSOR OF LAW, CARDOZO LAW SCHOOL, YESHIVA UNIVERSITY, NEW YORK, NEW YORK

Mr. SCHECK. Thank you very much, Senator Specter.

In an epilogue to his 1995 decision vacating the conviction and death sentence of Ron Williamson of Oklahoma, United States District Court Judge Frank Seay wrote:

"While considering my decision in this case I told a friend, a layman, I believed the facts and law dictated that I must grant a new trial to a defendant who had been convicted and sentenced to death. My friend asked, 'Is he a murderer?' I replied simply, 'We won't know until he receives a fair trial.'"

"God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case. Accordingly, the Writ of Habeas Corpus shall issue..."

Now, Senator Kyl, this is a case cited by Senator Leahy in his opening remarks, and Ron Williamson's sister, Annette Hudson, is here today. She measured his coffin 5 days before the execution. And Dennis Fritz, who testified with respect to the Innocence Protection Act, who was sentenced for life, is here today. I want you to know that on remand of that case, both Ron Williamson, who came within 5 days of execution, and Dennis Fritz, who served 12 years of his life sentence, proved their innocence through a series of DNA tests which also identified the real murderer, Glen Gore. Gore was the chief witness against Williamson and Fritz, and Judge Seay found in his opinion that Williamson's lawyer was grossly ineffective on a number of grounds, including the failure to investigate Gore as a possible suspect. He also ruled that suppressed *Brady* material and refusal by the trial court to appoint an expert, an *Ake* error, were material due process violations. All these contentions were rejected by the Oklahoma Criminal Court of Appeals as procedurally defaulted and without merit such that, under this bill—there is no question about it—Judge Seay would have been stripped of jurisdiction to hear this case and reach the merits. If S. 1088 had been the law in 1995, Ron Williamson would have surely been executed, an innocent man; Dennis Fritz would still be in prison; Glen Gore would have had an opportunity to commit more crimes—he was eligible for imminent release. And, needless to say, a civil rights suit that we later filed in this case that exposed stunning misconduct would have never come to light.

The take-home lesson from the Williamson and Fritz case is that the wrongly convicted cannot prove their innocence until they have competent counsel, appropriate experts, access to exculpatory evidence, and, most important of all, a full and fair hearing on the merits of their procedural due process claims.

The reason we care about procedural due process, after all, is that it leads to accurate results, and its opposite leads to the opposite. That is why so many innocence cases do not start out presenting innocence claims at all but, rather, procedural due process violations, and proof of innocence only emerges once the rubble of these other legal errors are swept aside. So any habeas bill that tries to restrict claims that start off with fully developed showings of actual innocence will make sure that these innocence claims will never come to light, it will bury them. And that is exactly what this bill will do.

I want to make it very, very clear because, Senator, you have been talking about the *House* case, which is now before the United

States Supreme Court, where six judges in the Sixth Circuit said that House, as far as they are concerned, was actually innocent based on a DNA test. One judge said, "I think he gets a new trial." And eight judges said, "Well, we do not think he passes through the innocence as a gateway exception," which is a standard that is lower than the clear and convincing evidence standard that this bill, Senator Kyl, you say uses as a protection in every provision to protect the innocent.

But let's be very clear about this. In the Williamson and Fritz case, there was definitely an ineffective lawyer; there was definitely exculpatory evidence; but they did not have at that point in time enough evidence to get even close to this standard. House does not have evidence to get close to the standard in the sense that if this bill were passed, the Supreme Court may very well have to dismiss that writ as improvidently granted and never reach this issue in theory, because House's lawyers procedurally defaulted these claims in the State courts.

What I must emphasize is this bill says that the innocent, even if you have clear and convincing evidence of innocence, which is a high standard, could not present it unless the facts underlying the claim—if the facts underlying the claim could have been found with the exercise of due diligence. And that is what happens all across this country. There are lawyers that do not get—you could look at almost every case and say there is no due diligence in terms of perfecting these claims.

One last point before I close. I see my time is about to end. This is not a problem that DNA solves. We have 159 post-conviction DNA exonerations. We have found in 44 instances the real perpetrator. This is a different list, Senator Kyl, than the death penalty ones you were talking about. Somebody go look at this list. There is no question these people are innocent. But only 20 percent of cases, I must emphasize, have any biological evidence that you can perform a DNA test on. Eighty percent of the cases, there is no DNA. But what we have learned from these DNA exonerations is that the ineffective lawyers, the suppressed *Brady* material, the prosecutorial misconduct, the mistaken IDs, the false confessions, there is so much of that out there on other cases that we can only get if lawyers have an opportunity for a full and fair litigation in the cases of innocence. There are many, many more of them out there than anyone ever expected. That is what we have learned in the last 10 years.

There are ways of speeding up these procedures, Senator Feinstein, and you pointed to them. We can create limits. I would suggest this is a very simple matter. If you want to speed up the Federal habeas system, when you get into Federal court you can pass a bill that says there is a time limit, but just like in North Carolina and some other cases recently, the prosecutor's entire file—the entire file—should be turned over to the Federal district court judge so we can look at it and find any suppressed material and any other errors. That is the kind of direction we should be going instead of creating all these procedural bars which are going to lead to more litigation; and as Mr. Waxman is going to tell you, I do not think the statistics support that there really is a systemic problem.

[The prepared statement of Mr. Scheck appears as a submission for the record.]

Chairman SPECTER. Thank you, Professor Scheck.

Our next witness is the Chief Counsel of the Capital Litigation Section of the Arizona Attorney General's Office, Mr. Kent Cattani, a law degree from the University of California-Berkeley in 1986, and he has been with the AG since 1991, represents and supervises attorneys in State and direct appeals, post-conviction proceedings, and Federal habeas corpus proceedings in Arizona capital cases.

Just a brief aside, do you work at all with Barnett Lotstein in Arizona?

Mr. CATTANI. I do not personally, but I do know of him.

Chairman SPECTER. He is an ex-patriot of the Philadelphia D.A.'s office. We are practically everywhere.

Thank you for joining us, Mr. Cattani, and we look forward to your testimony.

STATEMENT OF KENT E. CATTANI, CHIEF COUNSEL, CAPITAL LITIGATION SECTION, ARIZONA ATTORNEY GENERAL'S OFFICE, PHOENIX, ARIZONA

Mr. CATTANI. Thank you, Mr. Chairman.

I disagree that there is not a problem with Federal habeas. The AEDPA has not solved the problem of excessive delay in Federal habeas proceedings, particularly in capital cases in Arizona. Although the AEDPA made several changes that have improved the process, in the final analysis delay has increased rather than decreased since the enactment of the AEDPA. I am not suggesting that the AEDPA has created the increased delay, but the AEDPA has not operated to decrease the amount of delay that we face in capital cases in Arizona.

We have no interest in executing or even incarcerating an innocent person in Arizona. We take very seriously our role as prosecutors, and we have helped to create a system in Arizona that provides multiple opportunities to establish claims of innocence. There is no time bar in Arizona to raising a claim of actual innocence of a crime or innocence of the death penalty. Since 1993, we appoint two highly qualified attorneys in every capital case at the trial stage. We appoint yet another highly qualified attorney to represent defendants at the direct appeal stage. And then we appoint yet another attorney, another highly qualified attorney to represent the defendant in post-conviction relief proceedings stage. Funds are made available for investigation, and for expert witnesses. Having created this type of system, we are frustrated by the seemingly endless round of Federal habeas review in the Federal district court and in the Ninth Circuit.

One of the key provisions of the AEDPA was what is known as the opt-in provision. The opt-in provision was designed to accelerate Federal habeas review in capital cases on the condition that States establish a mechanism to provide for the appointment of competent counsel at the post-conviction stage. We anticipated that if those provisions were applied in Arizona, the length of the Federal habeas process would be reduced to approximately 3 years. The theory underlying the opt-in provisions was that if you ensure

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competent representation in State court, there is less of a need for lengthy Federal proceedings.

Arizona responded to the AEDPA by enacting new standards for the appointment of counsel in post-conviction proceedings. Attorneys have to meet specific criteria to be eligible to be on a list of qualified counsel that is maintained by the Arizona Supreme Court. In 21 cases in which counsel have been appointed from the list of qualified counsel, the State has thus far expended over $1 million to represent these indigent defendants in capital post-conviction proceedings. In some cases, the State has paid in excess of $100,000 in attorneys' fees and costs in a post-conviction proceeding.

Nevertheless, we have not opted in, and I believe there are no States that have opted in under the AEDPA. Why haven't we opted in? After we enacted these provisions to provide for compensation for counsel in the post-conviction stage, defense attorneys temporarily boycotted the system, some out of a concern that it would facilitate expediting review. Others boycotted because they were concerned about whether there would be adequate compensation.

The Arizona legislature clarified that there is no cap on attorneys' fees. Attorneys are paid $100 an hour for up to 200 hours of work, even if a post-conviction petition is not filed, and additional compensation is paid upon a showing of good cause.

Attorneys have in fact been compensated well in excess of $20,000 for handling capital post-conviction proceedings.

In any event, because of these concerns, there was a delay in the appointment of counsel in these first cases after the new standards were enacted.

The first case in which we attempted to take advantage of the opt-in provisions was in the Anthony Spears case. The Ninth Circuit ruled that the standards that we have adopted for the qualification levels for the attorneys who represent defendants in post-conviction are satisfactory. The court refused to allow us to opt in, however, because there had been a delay in appointing counsel. In Spears' case, there had been a 20-month delay before he was appointed to represent Spears. We argued that the 20-month delay did not prejudice Spears, and, in fact, Spears' post-conviction counsel never argued in State court that this 20-month delay had created any kind of an impediment to raising claims in the post-conviction process.

In our view, Spears received the benefit of the opt-in provisions. The State has created an opt-in mechanism to appoint competent counsel. Spears received counsel appointed under that system.

It is important to note that our attempt to opt in is not just a belated effort for technical compliance. Again, we take very seriously the need to protect the innocent, and in my view, the proposed bill takes that into account. There are provisions to ensure that people who are actually innocent of the crime will get Federal review.

I see my time has run out. Thank you, Mr. Chairman.

Chairman SPECTER. If you need a little more time, go ahead, Mr. Cattani.

Mr. CATTANI. I would just note that to evidence our concern for innocence, the Arizona Attorney General's Office has worked with

the Arizona Supreme Court and the American Judicature Society to study cases in which there has been an exoneration. There have been two such cases in Arizona. Significantly, the exonerations were the result of State court proceedings. Neither of the defendants had ever filed anything in Federal court. And we certainly try to learn any lessons that we can from an exoneration, but I think it is important to note that these exonerations were the result of State court proceedings. We have a mechanism that allows for the development of newly discovered evidence at any time, and I think in all of the cases that we have seen in Arizona, the provision for newly discovered evidence allows a defendant to pursue this claim of innocence. In addition, our rules provide for a free-standing claim of innocence; this allows an opportunity to present claims of innocence at any time.

Our frustration with the Federal habeas process is that it does not recognize the improvements that have been made to the criminal justice system. The people of Arizona, in particular, the victims of violent murders, deserve a better system. Our current Federal habeas process is not working, and I urge your careful consideration of the proposed amendments.

[The prepared statement of Mr. Cattani appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Cattani.

Our next witness is the Honorable Seth Waxman, Solicitor General for 4 years from 1997 to 2001, summa cum laude from Harvard, Yale Law School, Rockefeller Fellow, American College of Trial Lawyers, very distinguished record, currently heads the appellate practice at Wilmer, Cutler. Thank you for coming in today, Mr. Waxman, and we welcome your testimony.

STATEMENT OF SETH P. WAXMAN, FORMER SOLICITOR GENERAL OF THE UNITED STATES, AND PARTNER, WILMER, CUTLER, PICKERING, HALE AND DORR, WASHINGTON, D.C.

Mr. WAXMAN. Thank you very much, Mr. Chairman, and thank you for the opportunity to speak today. It is a great honor and a pleasure to be on the panel and to be surrounded by—

Senator FEINSTEIN. Turn on your mike, please. Thank you.

Mr. WAXMAN. To be surrounded by prosecutors from the State of Arizona, which, in my experience, is a particularly and, I would have to say, uniquely forward-looking State for reasons that Mr. Cattani has expressed—the only State, to my knowledge, that has attempted in the 10 years since AEDPA was enacted to opt in to the system that this Congress created 10 years ago.

Mr. Chairman, I have been a litigator my entire professional life, which, as my children remind me every week, has been very long. I have been a trial lawyer and an appellate lawyer. I practice in State and Federal courts, in civil and criminal and post-conviction cases. And I have done so in private practice and on behalf of the United States Government. I am not philosophically, morally, or ideologically opposed to the death penalty. To the contrary, while I was in the Justice Department, I served for years on a committee that recommended to the Attorney General of the United States cases in which the Government should affirmatively seek the death penalty, and we did so successfully.

I have no patience in my personal or professional life, as colleagues and family members will tell you, for delay for its own sake, procedural games, and maneuvering that gets in the way of answering substantive questions and moving on. I understand, I think, the sentiment that lays behind this bill that Senator Kyl introduced and that Representative Lungren has introduced in the House. I cannot support it. I must and I do oppose it, and I urge the Senate to reject it—not because I think the sentiments are misguided, but for four reasons which I would like to tick off in the horribly short remaining time.

I have a written statement that I submitted that I hope the Committee will take a look at.

Chairman SPECTER. It will be made a part of the record.

Mr. WAXMAN. I like to keep abreast of what is going on, but I must say that I only learned of this legislation late last week, and I am struggling to try and understand how all of its interrelated provisions apply. But let me just make four points very briefly, which I would be happy to elaborate on in response to any questions.

I have four reasons for opposing this legislation as drafted. Two of them relate to AEDPA, which is legislation that I think every member of the Committee who spoke referred to and for which I had fairly substantial personal involvement in drafting and analysis. Two are more fundamental.

My AEDPA points are as follows:

First, I was quite interested to hear the statistics that Senator Kyl cited this morning. I had not seen them before. I was also really very interested in reviewing the statistics from the Administrative Office to which Senator Feinstein referred, which are reported in a letter to the Committee from Thomas Hillyer. But my bottom-line point with respect to AEDPA is I am not aware of any study, systematic or otherwise, or any collection of data that looks at the effectiveness or ineffectiveness in AEDPA in reducing the particular targeted problems that the Congress of the United States legislated to fix. There may be more post-conviction cases now filed, but what AEDPA was designed to address is how readily they get adjudicated, particularly in Federal courts. And the statistics that I saw in Mr. Hillyer's letter actually suggest, if anything, that AEDPA has been quite effective. I urge the Committee to enlist the Administrative Office or the Federal Judicial Center, and let's see how the specific provisions of AEDPA have worked out—to identify where there continue to be frustrating and unconscionable and indefensible delays in getting to the merits of constitutional claims.

My second AEDPA-related concern is that any time the Congress legislates in a wholesale fashion to substantially revise procedures—particularly in the criminal area, and most particularly in the post-conviction area—a wave of litigation is generated, raising statutory interpretive questions and constitutional questions. We are now only emerging from that wave of litigation with respect to AEDPA. And I fear—I think it is a certainty—that this legislation will generate a new wave of litigation, both interpretive and constitutional, that will take the Federal courts years to adjudicate rather than streamlining these proceedings.

If I may just have one minute to mention my two more fundamental objections, I will simply tick them off.

Chairman SPECTER. You may proceed, Mr. Waxman, for a little more time.

Mr. WAXMAN. Thank you. I am totally in favor of streamlining procedures where procedures are not, in fact, streamlined and where that can be done without sacrificing fairness to both sides concerned. But many, I would say most, of the substantive provisions of this bill are, in fact, jurisdiction-stripping provisions. I referred in my written testimony to Sections 2, 4, 6, and 9, which do not establish tighter timetables or different standards. They deprive Federal courts of jurisdiction to hear categories of cases. And that is, I think, fundamentally inconsistent with long-standing statutory and constitutional traditions. I do not think that stripping Federal courts of jurisdiction in categories of these cases is the appropriate way to achieve a streamlining function. And I am very concerned—and this is really my principal concern here—with the number of cases in which substantial majorities of this Supreme Court have concluded that fundamental constitutional rights, many going to guilt-innocence, were violated and violated in such a way that even under AEDPA standards, the writ of habeas corpus must issue—and yet which would not even make it into Federal court under the provisions of this bill. And I have listed and described four of them, one each from the past four terms in the Supreme Court, in my legislation.

Thank you for your patience.

[The prepared statement of Mr. Waxman appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Waxman.

Our next witness is the Executive Director of Equal Justice Initiative and Professor of Clinical Law at New York University School of Law, Professor Bryan Stevenson, nationally acclaimed for his work challenging bias against the poor and people of color in the criminal justice system; Harvard Law School and Harvard School of Government; has an extensive record in assisting the poor.

Thank you for coming in, Professor Stevenson, and we look forward to your testimony.

STATEMENT OF BRYAN A. STEVENSON, DIRECTOR, EQUAL JUSTICE INITIATIVE OF ALABAMA, AND PROFESSOR OF CLINICAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. STEVENSON. Thank you, Senator Specter.

I would like to first just put in context some of what we have been talking about today. We should all be mindful of the fact that over the last 30 years, the number of people in jail and prison has increased dramatically. In 1972, there were 200,000 people in jails and prisons. Today there are 2.1 million.

Since the passage of AEDPA, we have actually added some 700,000 people to jails and prisons, and anything we talk about with reference to the numbers of habeas filings has to be seen in that context. It would be very misguided for this Committee or any-

one to look at the number of filings without looking at the number of people being sent to jail and prison.

We talk a lot in this legislation about finality, but one threshold point I think needs to be clarified. This bill applies to all prisoners. It does not focus or expressly limit itself to death penalty cases. The reality is that in non-capital cases, which are the overwhelming majority of these filings, there is finality. None of these people are out on probation or bail or parole. They are not avoiding punishment. If they have a 20-year sentence, whether they have a habeas pending for 5 years or 8 years or 12 years does nothing to the finality of that judgment.

So what we are effectively talking about are death penalty cases. And when we talk about death penalty cases in this country, we have to look at the death penalty States. And with, you know, obviously appropriate deference to my colleagues from Arizona, the overwhelming number of death penalties in this country are being applied in the Deep South. It is Texas and Florida alone that outnumbers the rest of the death row population in the country by themselves, Mississippi, Alabama, Georgia, Virginia, and in these States we have had serious problems and continue to have serious problems with indigent defense.

All over the country, there are problems with innocence. I believe they start at the trial level, but we have still not done enough to make indigent defense appropriate. When you increase the numbers this way and you do not increase the resources for giving people aid, you are going to have wrongful convictions. In my State, 72 percent of the people who were sentenced to death were represented by lawyers whose compensation was capped at $1,000. In Texas, $800 caps on cases; Virginia, $13 an hour. These kinds of statutory schemes increase the likelihood of wrongful convictions, and I do not think we should be in any way confused about the fact there are people on death row, in jails and prisons, who are innocent.

This bill, I think, wants to kind of speed the process up, but is not really focused on where the problems are. The problems, in my judgment, begin in State court. Again, Deep South States. We do not have a public defender system. The State of Alabama does nothing to provide people lawyers when their case is affirmed on direct appeal, even in death penalty cases. Our statute says that if you can find a lawyer and that lawyer comes to the court, the court will appoint that lawyer, but the compensation cap for death penalty post-conviction appeal is $1,000. We have had 95 cases filed in the last 75 years. In none of those cases did the State do anything to provide people with lawyers. That means the cases do not get investigated. The cases do not get developed. There is no opportunity to explore issues of innocence or fairness until you get to Federal court, and this bill would, in fact, insulate many wrongful convictions.

I have got a client who is innocent. He has been on death row for 19 years. He has never filed a Federal habeas petition because he has been languishing in the State trial court for the last 15 years. He could not find a lawyer. He could not force the judge to rule. We have an elected judiciary. These problems are the real problems of delay. In many States, the length of time in State court

triples the amount of time people spend in Federal court. And we have got to understand that as it relates to these issues, this bill would do a lot of very, I think, unfortunate things to insulate wrongful convictions and innocence. The counsel problem that I am talking about is not addressed here. It in no way limits the application of these provisions to States that are doing the things that make State court review meaningful. And what that does is essentially protect States that are unwilling to protect the accused.

We have seen this in a number of ways. The exhaustion provision, for example, would prevent my client, who has been languishing on death row for 15 years, from getting to Federal court if the State courts never address his claims.

I did a case not too long ago where a death row prisoner had been convicted and was mentally ill. The State used an expert who testified that this man was not mentally ill, that he was faking his mental symptoms at the trial. He was denied relief, came within 7 days of execution, filed a habeas petition in Federal court. Months later, it was discovered that the expert who testified against him was a fraud, never graduated from high school, had no college degree, had been masquerading as a clinical psychologist for 7 years in a State mental institution.

This bill would strip away the opportunity for filing an amended petition to get to that claim, which did not go to factual innocence, at least at that stage. And we see this all the time. These issues, as Professor Scheck talked about, oftentimes start as due process claims.

I was a young lawyer at the Southern Center for Human Rights—if I could just have one more minute to complete.

Chairman SPECTER. Go ahead, Professor Stevenson.

Mr. STEVENSON. Thank you, sir. I was a young lawyer at the Southern Center for Human Rights when we got a case in our office that went to the United States Supreme Court where a prosecutor had basically sent a memo to the clerk to kind of teach the clerk how to under represent black people in jury pools. This racial bias that was detailed in this memo was hidden, and it was only years after that this memo was discovered, it was challenged, and the State court said the claim is procedurally barred. And that happens a lot. We have had 25 cases in my State where prosecutors have been proved to use preemptory strikes in a racially biased manner. Many of those cases, the State courts say they are procedurally barred.

The case went to the United States Supreme Court, and the Rehnquist Court said unanimously, 9–0, this kind of bigotry cannot be insulated, cannot be tolerated. And it used language that this bill would eliminate to address the merits of that claim. And it is those kinds of claims that I think are very much at stake, those kinds of concerns. The integrity of our criminal justice system is critical, in my view. And there is simply no one in this country who wants fair and efficient adjudication of their claims more than innocent people who are sitting in jails and prisons today. They desperately need that. But what this bill will do is actually make it infinitely harder for them to ever see the kind of justice that many of the people in this room have seen and witnessed and experienced.

I will end with one last case. We were involved in a case that a firm and some lawyers in Birmingham did years ago of a man who spent 17 years on death row. Claims were procedurally barred in State court. It got to Federal court, and the court granted relief, not on factual innocence, because those claims could not be developed, but on ineffective assistance of counsel at the penalty phase, something that would be barred from this bill, and a race bias claim at the trial, something, again, that would be barred. He was given a new trial, and at his new trial he was acquitted. He spent 17 years on death row. I dare say he would have been executed if this bill were law. And I think those kinds of concerns have got to urge this Committee to turn this legislation around and please give it deeper and more careful consideration.

Thank you, Senator.

[The prepared statement of Mr. Stevenson appears as a submission for the record.]

Chairman SPECTER. Thank you, Professor Stevenson.

Our final witness on the panel is Mr. John Pressley Todd, Assistant Attorney General in Arizona, a law degree from Arizona State University, 30 years' experience as a prosecutor, trial lawyer, and appellate lawyer in the Arizona Attorney General's Office. A real career prosecutor, Mr. Todd. Thank you for coming.

STATEMENT OF JOHN PRESSLEY TODD, ASSISTANT ATTORNEY GENERAL, ARIZONA ATTORNEY GENERAL'S OFFICE, PHOENIX, ARIZONA

Mr. TODD. Thank you, Mr. Chairman. It is a great privilege to be here. I also had the—

Senator LEAHY. Is your microphone on, Mr. Todd?

Mr. TODD. I am sorry. I also had the privilege of serving 15 years with Barnett, investigating and litigating trial cases, frauds and so forth. And I spent my first 15 years in the first segment of the criminal justice system. I have spent my second 15 years in the second segment of the criminal justice system. And Federal habeas affects just a small portion of the second segment. If there is a problem of innocence, those cases can really only be addressed in the States.

As Senator Kyl mentioned, there are like 23,000 pending habeas petitions currently in the whole Federal court system. In one county, in Maricopa, in Arizona, there is double that amount of cases tried. The Federal courts cannot simply retry all the State cases. It cannot work.

The system that is in place and that we are asking to be made better is a logical, reasonable system. What is good about this bill is it undercuts the procedural delay and focuses the Federal courts on—if there is any legitimate question of innocence, it focuses the courts on that question.

In any criminal case, there are only two types of errors. There is the error where an innocent person is convicted, and there is the error when a guilty person goes free. Now, the way we have created our system is, at the time when the evidence is most reliable, when the evidence is most fresh, we have a trial, and we provided all sorts of procedural safeguards at that trial to be sure that if there is an error, it errs on letting the guilty person go free.

Since common law starting with the Magna Carta, 800 years ago, we have left to the jurors the fact-finding process. By the time we get to Federal court, factual issues are years and years removed. As the first speaker indicated, memories fade, witnesses become uncooperative. And to create a system that relies on retrying many cases in Federal court, you cannot. It is just physically not possible.

The problem in Federal court is that instead of raising legitimate issues of constitutional merit which have been presented in State court, particularly in death penalty cases, individuals feel that they have to try and raise a multitude of claims that are without merit. And all this does is build delay into the system. The only persons who benefit by delay are those who are under a sentence of death who are guilty. A person who is under a sentence of death who is innocent certainly does not benefit by delay, and no non-capital defendant benefits by delay.

So this bill has the safeguard of truly innocent people getting into Federal court. It does away with the ability of people who are simply trying to create delay to postpone the State's judgment. It undercuts this procedural delay.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Todd appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Todd.

Mr. Waxman, I will begin with you. You have had an extraordinary record as an appellate lawyer, Solicitor General, head of a big firm's appellate practice. You object to delay. You oppose the bill. What is the answer to these very, very long delays which have become epidemic?

Mr. WAXMAN. I would very much like to work with the Committee of the administrative office or the Justice Department, or whoever it is would look at the extent to which delays remain in the system and where and why. Before I can answer the question, Mr. Chairman, I would need to know.

I have been involved in cases in which the State courts, for whatever reason, have simply not decided meritorious constitutional claims for many years, and no—

Chairman SPECTER. Mr. Waxman, we will accept your offer, just so long as you will not utilize your customary hourly rate.

[Laughter.]

Mr. WAXMAN. Mr. Chairman, I will charge the Committee exactly what I am charging the Committee today, which is—this is a public service—

Chairman SPECTER. Well, we can double that.

[Laughter.]

Mr. WAXMAN. I will tell you what, I will give you 50 percent off, and I would be delighted to work with the members from both sides to come up with—to figure out where the problems are and come up with a solution that is fair to both sides.

Chairman SPECTER. We are going to take you up on that because you have had the experience to have some really unique insights.

Professor, Scheck, you raised a proposition of making the entire State court record available to the judge on habeas corpus proceedings. Amplify what you mean by that. Is that record now not available customarily?

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Mr. SCHECK. Actually, there are a lot of problems even getting transcripts in place. What I am really talking about, when you get to the issue of innocence, is the entire prosecution file. Obviously, during the course of a criminal case the defense is not entitled to the—

Chairman SPECTER. The entire prosecution file, so it is more than the trial record, obviously.

Mr. SCHECK. Yes. And that is exactly—take the case of Darryl Hunt who is here in the audience, who spent 20 years in prison for a crime he did not commit. I will bet you that Judge Ludick and Judge Wilkinson, who actually rejected his claim when there was some DNA evidence showing that he was innocent in some Brady claims, would really like to see that as well, because when he went into Federal court, it was a closed case, but he could not even get a hearing. Then after his case came down we finally got a new DNA test that identified the real perpetrator.

And here is my point, when the real perpetrator was identified, we found in the prosecution's file exculpatory evidence indicating that the police knew about him.

Chairman SPECTER. Let me stop you there because of the limitations of time, and turn to the prosecutor.

Mr. Dolgenos, how about that, would you be willing to follow Professor Scheck's idea and turn over the entire file?

Mr. DOLGENOS. I think that is a terrific over-reaction, Mr. Chairman.

[Laughter.]

Mr. DOLGENOS. Concerns of—

Chairman SPECTER. Give us a little under-reaction.

Mr. DOLGENOS. Police investigations and law enforcement investigations are filled with material, witness statements and police information that it is important to keep confidential. There are discovery rules in State court.

Chairman SPECTER. How about redacting all the confidentiality? Professor Scheck is suggesting if there is some exculpatory evidence in your file.

Mr. DOLGENOS. Well, exculpatory evidence is absolutely subject to discovery in every State court. The question is whether or not States can enforce or have their own rules of discovery. If we have a policy in Federal court where we hand over the entire prosecution and police file, the funnel's absolutely backwards. Then the Federal proceeding becomes the main event and the State proceeding becomes merely a preliminary, simply—and I do not think there is any basis for that. I mean obviously Brady violations are very important and—

Chairman SPECTER. Mr. Dolgenos, I hate to cut you off but I want to ask Mr. Cattani a question, and I also want to observe my time limit.

Habeas corpus, the subject matter we are dealing with, constitutional standing. Does the Congress have the authority to strip the courts, the Federal courts of jurisdiction on constitutional issues, Mr. Cattani?

Mr. CATTANI. Yes, I think Congress can certainly restrict the types of claims that can be raised.

Chairman SPECTER. Even on constitutional issues?

Mr. CATTANI. Yes. I think this Congress has the authority to do that. And the jurisdictional restrictions are important. What we face in the overwhelming majority of our cases is a relitigation of the mitigation investigation as it relates to sentencing. Notwithstanding the fact that we have gone through a mitigation investigation at trial and again in the post-conviction stage, we move into Federal court and the attorneys representing the petitioner in Federal court start over with a complete mitigation investigation. This means we are no longer focused on guilt or innocence, we are focused instead on whether there is some additional mitigation? And of course there is always additional mitigation that can be found. There is always someone else somewhere who will say something about the defendant's background.

In my view, at some point it does become necessary to say we have to cut off certain types of claims or we simply will not have finality in the process.

Chairman SPECTER. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Cattani, just to follow up just a little bit, you say this Congress has the right to strip the courts of jurisdiction over constitutional matters. Assuming I agree, would you also agree that if the Congress is going to remove the ability of a Federal court to have jurisdiction on something involving constitutional matters, your constitutional rights, would that not be a step that the Congress should take only with enormous deliberation?

Mr. CATTANI. I certainly would agree that there should be careful consideration, but I think the proposal that has been made—

Senator LEAHY. I am not talking about this proposal. I am just talking about in general.

Mr. CATTANI. Certainly. Careful consideration, and I think it is important to provide safeguards for actual—

Senator LEAHY. Those may be your constitutional rights we are talking about too.

Mr. CATTANI. Sure.

Senator LEAHY. Mr. Waxman, again, thank you for being here, and I concur with the Chairman, we much appreciate you taking the time because of your own vast experience.

We are told that this bill is to eliminate inefficiencies in the exercise of Federal habeas jurisdiction, not to eliminate habeas all together. But you said in your testimony that it strips Federal courts of jurisdiction to vindicate meritorious constitutional claims. Would you elaborate on that a little bit, please?

Mr. WAXMAN. Well, I will not be able to as much as I would like to, but I listed, just so that the Committee could review, four cases that were recently decided by the Supreme Court of the United States, where substantial majorities of the Supreme Court concluded in Federal court review of State criminal convictions, where the State courts had—I believe in all of the cases there was counsel in the State courts. The State courts concluded that the writ of habeas corpus need not and should not issue. The Supreme Court of the United States, in each of those cases, concluded by a substantial majority that—accepting all of the facts as found by the State courts, giving complete deference to the fact finding of the State courts—egregious violations of constitutional rights, three of them

going to the guilt/innocence stage, had been committed to the point that the State courts had not only erred in their judgment, but that there was an unreasonable application of the facts as found by the State court to the settled law as announced by the Supreme Court of the United States.

Now, I am not throwing stones at State courts or State court judges. State court judges are human beings just like Federal court judges and just like everybody sitting in this room is—

Senator LEAHY. Except for Senators of course.

[Laughter.]

Mr. WAXMAN. Yes, some present company excluded.

It is part of our tradition, our constitutional tradition, our statutory tradition and our cultural tradition going back to Magna Carte, that in criminal cases, and particularly in cases where the penalty to be exacted is death, we need safeguards and we need some redundancy, and the fact that in our day and age, under AEDPA, which has raised the bar very substantially, 6–, 7–, and 9–Justice majorities of the current Supreme Court have found instances where they have said: Look, taking all the facts as found by the State court, even in a case in which there was counsel, we have no choice but to conclude, no alternative but to conclude that fundamental constitutional rights were violated that require issuance of the writ.

What I am concerned about is that with respect to the four cases that I identified over the weekend and have explained to the Committee, those people, if this bill passed, almost certainly would not have been able even to get into Federal court.

Senator LEAHY. Then would you agree—I think you would not agree—the principal sponsor of this bill in the House said that if a petitioner had meaningful evidence of innocence he would not be subject to the bill's jurisdiction-stripping provisions and the other procedural hurdles? Does this bill really create general exceptions for people with meaningful evidence of innocence? I could not find them.

Mr. WAXMAN. I fear that it does not, and I would very much like to see—if this legislation were going to pass with an actual innocence exception—that standard that you just articulated, rather than what is in the bill.

The reason I say that is as follows. The bill contains, with respect to a number of the jurisdiction-stripping provisions, an exception that can be met if the innocence standard that is already specified in AEDPA is met. Now, that standard, which I have explained at the top of page 3 of my testimony, is the standard that the Congress imposed on second or successor petitions under AEDPA. It was a major point of AEDPA to reduce or eliminate the opportunity for petitioners to file second or successive petitions. And in order to invoke that innocence exception, you need to prove under this bill, as under the successor provisions of AEDPA, No. 1, that the claim of innocence that you are making rests on a factual predicate that quote, "could not have been previously discovered through the exercise of due diligence." Even if you had no lawyer, even if you found DNA evidence, but a diligent lawyer could have found it, you will not meet this exception.

In addition, under the standard that this bill imports from AEDPA, you have to show that the underlying facts that you come forward with that could not have reasonably been discovered before, quote, "would be sufficient to establish by clear and convincing evidence, that but for constitutional error, no reasonable fact finder would have found the applicant guilty."

As a threshold finding, that is breathtakingly difficult, and even that is not enough, because you also have to show, to come within the innocence exception, that a denial of relief on the basis of your constitutional claim was not only error by the State court, but in fact was, quote, "contrary to or would entail an unreasonable application of clearly established Federal law as determined by the Supreme Court." I find it difficult to think that any prisoner, as a threshold jurisdictional matter, could make those showings. The new evidence establishing innocence might have been discoverable earlier. It probably should have been if competent counsel were involved.

It might show very strongly that the person is likely innocent, but would it clearly and convincingly persuade every reasonable judge or jury of innocence as a threshold matter? And it might also have been wrong but not unreasonable to reject the underlying constitutional claim that innocence is attached to.

So if we are going to have a bill like this and we want to have an actual innocence exception, it seems to me we need to have one that does not pose the AEDPA, successive or second petition standard that was designed to—and in my experience has served very effectively—to eliminate Federal petitions.

Chairman SPECTER. Senator DeWine has to leave early, and Senator Kyl has graciously consented to let Senator DeWine go ahead.

Senator DEWINE. I thank my colleague from Arizona, and I thank the Chairman.

Mr. Waxman, you have cited here cases where you say were S. 1088 the law, the Federal courts would not even have had jurisdiction to review the meritorious constitutional claims, and then you cite these cases.

I would like to ask the rest of the panel. I do not know if you have had a chance to look at Mr. Waxman's examples here, but if any of you have, would you agree with his statement? Mr. Scheck?

Mr. SCHECK. I not only would agree with it, but I could put into the record 27 Supreme Court cases on a section by section basis that are affected by this decision. So if you are looking for, certainly as Mr. Waxman said, in the short term, this is going to cause an incredible set of delays.

The other thing is I have a list here—and it is just beginning—of 8 individuals who were exonerated who would not have been able to get into court.

I cannot emphasize enough what Mr. Waxman has been saying about this bar. What this bill says in Section 4 and in other sections, is if the State court said, oh, there was a procedural default, and I have a client—and we have a lot of them, a number from your State, Senator DeWine—you know, who are innocent people, I cannot get into Federal court for review if a diligent lawyer could have found it.

Now, take my friend, Brandon Moon, who—

Senator DEWINE. Mr. Scheck, I only have 5 minutes.

Mr. SCHECK. Oh, I am sorry. Brandon Moon is sitting in this room and that is exactly what happened to him.

Senator DEWINE. Love to hear you for an hour.

Mr. SCHECK. That is exactly what happened to him.

Senator DEWINE. Let me ask the people on the panel who are in favor of the bill if they could comment, because ultimately we get down to specifics. We are talking about real cases, real people, real victims, real defendants. Do you agree with what Mr. Scheck said? Do you agree with what Mr. Waxman has said? Are these cases going to be knocked out of court where the Federal District court, if it wants to hear the case, just says, cannot hear it? Yes, no?

Mr. DOLGENOS. Senator, if I may, I do not agree with that.

Senator DEWINE. So you disagree. All these cases that he has cited you have looked at them, you have looked at them, and all of these cases that he has cited, you would say no, he is wrong about that?

Mr. DOLGENOS. I cannot make that statement, Senator. I have not had a chance to look at the list of cases.

Senator DEWINE. Will you take a look at that list and give me something in writing?

Mr. DOLGENOS. Absolutely, I would absolutely like to do that, Senator.

Senator DEWINE. Okay. How about the rest of those of you who are in favor of the bill, anybody else?

Mr. TODD. I have looked at one of the cases that Mr. Waxman cited, and that was the case that dealt with three witnesses leaving during trial, defense witnesses that could establish an alibi and happened to be relatives of the defendant. It would seem to me that would be an absolute defense, and if those witnesses went to Federal court and testified and were credible, that would satisfy the bill.

Senator DEWINE. You could get into court?

Mr. TODD. That is my opinion.

Senator DEWINE. Mr. Waxman.

Mr. WAXMAN. I wish that were the case. I think the case that Mr. Todd is referring to is *Lee* v. *Kemna*, which was decided by the Supreme Court in 2002. I think it is very, very clear that under Section 4 of this bill, this case could not get into court. Just very, very briefly, it was a case of murder that took place in Missouri. The defendant's defense was alibi. He had three witnesses from California who came to testify that he had been in California on the day the offense was committed. They were in the Federal courthouse under subpoena, sequestered in a separate room where the witnesses were held. They were told during the course of the day by an unnamed person who subsequently the Supreme Court opinion reflects was an employee of the State, that the State's prosecution case was going to take so long, that they would not be called till the next day, and they could and should leave.

When the defense lawyer called them out of the sequestered witness room, he was told that they had left. He asked for a short extension to find them because they were his alibi witnesses. The judge said no. He asked that the case be adjourned till the next

day. The judge said no because he was going to be visiting his daughter in the hospital the next day. He asked for an adjournment till the following Monday. The judge said: I have another trial starting that day.

The Court of Appeals in the State court came up with a new problem with the case, which is that he had not made his mid-trial motion for an extension in writing—

Senator DEWINE. Mr. Waxman, time is running. But ultimately you are saying that that case would not have been—the jurisdiction would not have been there. Is that your interpretation?

Mr. WAXMAN. Absolutely not. Section 4's treatment of procedural bar would have prohibited the court from hearing the case.

Senator DEWINE. My time is up. Let me just conclude with two things. One is, I would ask those of you on the panel or all of you on the panel, to take a look at Mr. Waxman's testimony, look at the cases cited that he has cited. Mr. Scheck, are you submitting your cases?

Mr. SCHECK. Yes. And the one I discussed, Williamson and Fritz, no question would the guy have gotten into court, he would be dead.

Senator DEWINE. Okay. My point is I want to get those to the other panel members, and I would like opinions from all the other panel members on those cases, whether or not this bill as written currently would bar the Federal court from hearing those cases. If I could get all of you to give me an opinion on that. I think that is very important.

I would also just, a final comment, say that we really have not heard much from any of you about Section 9 of the Act, which the way I interpret it, the Federal court would lack jurisdiction to hear any claims at all from a capital defendant as long as the State's been certified as having a procedure in place to provide counsel for post-conviction proceedings, very sweeping. We do not have time to get a response from any of you, but it seems to me that is quite interesting.

Thank you very much.

Chairman SPECTER. Thank you very much, Senator DeWine.

Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman.

The bill clearly puts up substantial barriers to Federal courts even with initial habeas appeals. I would like to ask each of you this question, if you could just answer it yes or no. Do you believe the bill as written is constitutional? Mr. Dolgenos?

Mr. DOLGENOS. I do.

Mr. SCHECK. No.

Mr. CATTANI. Yes.

Mr. WAXMAN. I doubt it, in all of its provisions.

[Laughter.]

Mr. WAXMAN. Sorry.

Mr. STEVENSON. No, Senator Feinstein.

Mr. TODD. I believe that, in my opinion, it would be constitutional.

Senator FEINSTEIN. Thank you. Sort of a clear division here.

My friend, Senator Kyl, said earlier that innocence cases take priority, and yet as I read page 4, it seems to me that the inno-

cence exception is curtailed and limited to new law that might be retroactive, or new evidence which could not have been discovered. Do you agree with that, each one of you? And if not, why not?

Mr. DOLGENOS. Senator, I do agree with that simply because I have seen too many cases where old evidence is submitted to the court and rehashed as evidence of innocence when it has already been rejected by the State court or has been rejected by a lawyer who decides, well, I am not going to use it because I do not think it is convincing. In other words, when evidence is stale, that is usually a good reason to think it is not credible.

Senator FEINSTEIN. Mr. Scheck.

Mr. SCHECK. The fact is that you can look at these records and you can see in case after case, like my friend from El Paso, that there was evidence that a diligent lawyer could have found—I mean literally in his case there was a DNA test and just one more thing had to be done, and it was clear that Brandon Moon was innocent. 17 years he tried to get that. He had no lawyer, until finally he got competent counsel and it was solved like that.

The problem is in this provision of the bill where innocence is supposed to be protected, not only is, as Mr. Waxman, is it a new rule, but if somebody could look at it and say, oh, that evidence could have been found with due diligence, even if you now have it and it proves somebody innocent, you cannot get into court. And the United States Supreme Court, as Senator Specter has emphasized, just took cert. in the *House* case where the issue of actual innocence is finally going to be put before them again for the first time since *Herrera*, and House himself could not have brought that case to the United States Supreme Court because his lawyer had procedurally defaulted and you could have said there is a lot of evidence that you could have found if he did it. That is the problem.

Senator FEINSTEIN. Thank you.

Yes?

Mr. CATTANI. Thank you. I have more confidence in our State court system. I think it is important to note that the difference in the level of review that you get if you commit a federal crime. You simply have your trial, your direct appeal and—

Senator FEINSTEIN. My question is that the innocence exception or the innocence ability to move the cases is really curtailed.

Mr. CATTANI. Right. And the point I was trying to make is that if you compare what happens with a State court conviction with a Federal conviction, with the Federal crime you have a direct appeal and you have some sort of post-conviction proceeding—that is it in the Federal system. And you have that same system in the States. Federal habeas review provides another layer on top of that. And so I think it is appropriate to have a higher standard to obtain relief in this layer of collateral review. So I am comfortable with this higher standard.

Senator FEINSTEIN. Thank you.

Mr. Waxman.

Mr. WAXMAN. Yes, it is curtailed in the respects in which I articulated, I think, in response to Senator Leahy's question.

Mr. STEVENSON. Senator, I just want to emphasize I think this is a very serious problem for precisely the reasons Professor Scheck talked about. Most innocence cases involve evidence of innocence

that was not presented at trial which could have been. But when you are dealing with lawyers who are capped at $1,000 for their defense work, who are undertrained, who do not have an opportunity to do it, they do not get it. My innocence case I was talking about turns on weapons evidence. He needed an expert. The court gave this defense lawyer $500 for his expert. The expert that he could bring in to do a ballistics comparison was half blind.

Senator FEINSTEIN. Was half blind?

Mr. STEVENSON. Yes, was legally blind in one eye and could not use the machine. And so what we had to do was bring the best experts in the country to a post-conviction hearing who all said there is no match, this man should be released. But that evidence could have been presented at trial. Under this bill, that threshold showing that it could have been discovered at trial, would bar us from review, and it is that kind of jurisdiction restriction I think absolutely will increase the execution of innocent people.

Mr. TODD. That has not been our experience in Arizona. I do not know the facts of Mr. Scheck's case, but DNA has progressed significantly since 1990 its ability to detect and exonerate people. And if the new DNA evidence was not available initially, then this would be newly discovered evidence that would be certainly appropriate under the bill.

Senator FEINSTEIN. May I ask one other quick question?

Chairman SPECTER. Yes, you may, Senator Feinstein.

Senator FEINSTEIN. Supposing the DNA evidence had been mishandled, it was there but it had been mishandled. Would the bill allow the case to go?

Mr. TODD. Yes, it was newly discovered that it had been mishandled.

Senator FEINSTEIN. See, what my problem is, I do not know what newly discovered really means in terms of the law. It could have been there but not used.

Mr. SCHECK. Newly discovered means that you could have found it with the exercise of due diligence, and this bill says as explicitly as it can be said, if a lawyer could have found it with due diligence, then you cannot bring it into Federal court. So like Mr. Moon, he had partial DNA exclusion just as the hypothetical you are giving. The lawyer—literally, it showed that it was not his semen but they needed to get an exemplar from the victim and her ex-husband in order to make the proof. And he waited 17 years trying to get that. He would not be able to get into Federal court.

Once we went and got the exemplar from the wife and the husband, proved him innocent, he could not get into Federal court to vindicate his claim under this bill. And *House* would be out of the United States Supreme Court in theory. That is how extreme this is.

Senator FEINSTEIN. Thanks, Mr. Chairman.

Thank you, Mr. Scheck.

Chairman SPECTER. Thank you very much, Senator Feinstein.

Senator Kyl

Senator KYL. Thank you, Mr. Chairman.

In 5 minutes here it is going to be hard to go over a lot, so I am just going to select two cases, the case that Professor Stevenson discussed, and the Williamson case discussed by you, Mr. Scheck.

I think in both cases, analyzed very carefully, this bill would not have prevented the assertion of actual innocence and the exoneration of the individual. Let me quickly go through both and then ask for your reaction to that.

In the Williamson case there were 6 claims that were raised and exhausted in the State court. And it was voided in Federal court, noting that the 6 claims were fully exhausted and not defaulted, and thus would have not been affected in any way by our bill standards for unexhausted and defaulted claims.

The bill would have prevented the Federal District Court from granting relief, you state, because the State courts found that the grounds for relief were—and I am quoting you—procedurally defaulted or without merit.

And so let us go back to the provision of the bill. The bill does not apply any special gatekeeper to claims that were addressed by the State court on their merits. And let us go over and just assume even had all of Williamson's claims been procedurally defaulted, which was not true. Then under the bill the defendant nevertheless would have still been able to raise these claims, presenting clear, previously unavailable evidence of innocence. This has to do with the semen and saliva evidence and the DNA.

And it seems to me pretty clear, and I think you have established it, that the DNA evidence showing that the rape victim was not raped by the defendant would meet the actual innocence standards.

So I do not believe that you have established that the bill would have denied the assertion of the claims. I know you believe that the semen and saliva evidence indicates the defendant was not the perpetrator and would be enough to meet the test. So comment briefly on that, and then I have got the case you cited.

Mr. SCHECK. When you go back and look at the case itself, you will see that the Oklahoma Court of Criminal Appeals said that some of the ineffectiveness claims were not raised, and they should have been on direct appeal. So they procedurally defaulted most of them. The ones that they reached were not even the ones for which the Federal judge granted relief. So I do not think there is any question that under this bill he would have been procedurally barred, and I will submit a more extensive analysis if you want.

But the real point I am trying to make here—

Senator KYL. Let me just interrupt there. At this point in the record it will show that I disagree with you, that a judge reached all 6 claims, and I am going to ask that the record of the case be put—rather, the decisions in the case be put in the record at this point.

Chairman SPECTER. Without objection it will be made a part of the record.

Mr. SCHECK. Even if he reached the claims, still under this bill it still would have been barred.

The other issue and the key one is, remember, Williamson's case was reversed and remanded on the ineffectiveness claims, and it was then afterwards that there was DNA testing that showed he was innocent, Fritz was innocent and Gore was the real perpetrator.

So to the extent you are suggesting that the DNA testing could have gotten him into Federal court beforehand, you know, they did not have that evidence.

And my real point to you, Senator Kyl, is that procedural due process means something in these cases. I have looked at more innocence cases, I dare say, in the last 11 years, than most people will in a lifetime. I go back and look at these cases, and you see again and again, whether it is in State or Federal court, there was hidden Brady material, there were ineffective lawyers. You know, you do find more of that in these cases.

Senator KYL. My time is just about up and I want to get to Professor Stevenson. We can put some more in the record if you would like.

This case of Hinton that you talked about, I actually think our bill would make it easier, not more difficult, and let me just quickly go over the fact here. You, in your testimony, detail the evidence with respect to his case, and of course I am not familiar with it, but if we accept that—talking about the tool mark and ballistics evidence that exonerates him, and let us assume that that is correct. And further you asserted the that State of Alabama agrees that without a weapons match Mr. Hinton should be released. So let us accept that as well, which would seem to establish the clear and convincing evidence that is the standard in the law today and the standard under the Act.

Under current law, a defendant has to exhaust the claims for relief in State court, including these actual innocence claims. In Section 2 of our bill, we change the requirement by amending the current 28 USC provision to provide that each claim in a Federal petition must either be exhausted in State court or must present clear evidence of innocence, this new evidence that we have talked about. So the bill would add a new provision that even if the claim had not been exhausted in State court, you could go forward with Federal habeas if you have this kind of innocence.

We were trying to bend over backward to ensure that whatever the procedural problems with the State court, you could always have the Federal habeas reviewed if you have this degree of evidence.

Mr. STEVENSON. Just two things as why I say that, Senator. We are not convinced we will ever get a ruling in State court. I do not know that after 19 years this case will ever be exhausted. And so what we have been relying on is language that currently allows us to utilize the jurisprudence under AEDPA a futility. Going to Federal court and saying we need relief—this man has been on death row for 19 years, and every day, every week, every month, he is being injured and victimized in ways that we have a hard time accepting.

What current law allows us to do at some point is to go to Federal court and say, after 19 years, after 15 years, we think exhaustion is futile. That is what is eliminated in this bill.

Senator KYL. Exactly my point, we eliminate—we do not eliminate the exhaustion requirement. We add an additional way in which you can get to the Federal court with exactly the kind of evidence that you have with a habeas petition.

Mr. STEVENSON. But, Senator, that would only happen if after we complete the State court process—

Senator KYL. No, that is—

Mr. STEVENSON. Because your bill says no more futility. We do not have the option of saying—the claim would be unexhausted if we went to Federal court now. And what your bill does is say that Federal judges cannot adjudicate unexhausted claims.

Senator KYL. We have a disagreement here because we are trying to specifically exempt that kind of situation by this showing of clear evidence of innocence, which would enable you to go to the Federal court. Let us discuss that further.

Mr. Chairman, if I could just make one final comment here.

Chairman SPECTER. Senator Kyl, do you need a few more minutes? Go ahead.

Senator KYL. No, no. I need just 20 seconds here.

There was a suggestion that—and I think, Mr. Waxman, you were the one that noted that State courts may not always be as efficient as they need to be, and they take a long time and there is certainly evidence that that can happen. I would just note that in the *Fornoff* case that I cited earlier, it took a long time in the State courts, but it has been in the federal courts since 1992. So Federal courts can delay forever just as easily as State courts, and in many cases have done so.

Chairman SPECTER. Thank you very much, Senator Kyl.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Stevenson, it is good to see you. I tell you, if I were in big trouble, I would love to have you defend me.

[Laughter.]

Senator SESSIONS. He has done a very good job in Alabama defending people on death row cases, and is an aggressive advocate. I know he deeply feels the death penalty is not wise, but so far the majority of Americans conclude otherwise.

I would just say a couple of things, Mr. Chairman, that we need to remember. With regard to convictions of crimes, people are allowed to appeal, and in most States there is an intermediate court of criminal appeals, and that is in the State system. If you are tried in State court—you could be tried in Federal court, of course, and have Federal appeals—but if you are tried and convicted in State court, your appeal is to usually the intermediate court of criminal appeals, and the State pays for that defense, both at trial and at that appeal. And then if one is unsatisfied with that, they can petition that the case go to the State Supreme Court, and the State, if it is approved, the State will pay a defense counsel to represent the person in the State Supreme Court.

What we are talking about here is what used to be very, very rare and has now become just commonplace. The Attorney General's Office in Pennsylvania has a whole section dealing with Federal habeas appeals, do they not, Mr. Dolgenos?

Mr. DOLGENOS. We do, Senator, yes.

Senator SESSIONS. Now, what used to be a very rare thing just routinely occurs, and you have sections in your office handling appeals in Federal court. Historically, there has not been—the State has not paid for those appeals, have they?

Mr. DOLGENOS. Historically they did not exist to the extent they exist now, Senator.

Senator SESSIONS. So now we are finding ways to make sure that they have those appeals. And then they go up from the Federal District Court to the Federal Circuit Court of Appeals and even to the U.S. Supreme Court; is that right?

Mr. DOLGENOS. That is absolutely right.

Senator SESSIONS. And that is what you do every day.

Mr. DOLGENOS. Absolutely, Senator.

Senator SESSIONS. So now we have had a series of appeals all the way up to the State Supreme Court, then presumably the conviction is affirmed. Then they go into Federal court, and this occurs in every death penalty case, does it not, Mr. Stevenson? You would never allow a client to be executed if you had not begun a process to review the conviction in Federal court.

Mr. STEVENSON. We would not if we could get to it, Senator, but of course, we have had cases that have not gone to Federal court where people have been executed in part because our resources to represent everyone are exhausted. We do not have lawyers for everybody on Alabama's death row, and once they miss the statute of limitations, then they are barred from Federal review.

You know, the last two executions in Alabama were people who never had Federal court review. You are right, it is certainly our intention to represent everyone.

Senator SESSIONS. Did either one of those renounce Federal court appeals and ask to be executed?

Mr. STEVENSON. Two of them did, but the other—we have somebody scheduled for execution actually in August, who did not, who wants review and was unable to get it because of the statute of limitations problem.

Senator SESSIONS. But you are working to get that.

Mr. STEVENSON. Well, not at this time, no. I mean I think you are absolutely right, there is this appellate—the problem in our State is that we have got this cap on compensation for direct appeals of $2,000, a cap on representation in post-conviction of $1,000, and we cannot find lawyers for a lot of these folks. We are relying on volunteer counsel.

Senator SESSIONS. Well, it is true that there is no limit now on the trial of capital cases, and I think that is good.

Mr. STEVENSON. Absolutely.

Senator SESSIONS. And that is the most important thing, that is what used to count, the trial. Now we drag these cases out for years. Here, in the Fornoff case, this lady, the conviction of the murderer of her daughter, Christy, who was 13, occurred in 1985. It was upheld by the Arizona Supreme Court after appeals, and he then filed challenges in Federal District Court where it remained for another 7 years. Finally in 1999 the district court dismissed the case, dismissed the appeal. Then a few years later the Ninth Circuit sent it back for more hearing. It is still pending.

The Benjamin Brenneman case in 1981, the 12-year-old was kidnapped, assaulted and killed. He was convicted, a defendant was, sentenced to death, filed a habeas petition in Federal court in 1990. 15 years later it is still before the same court. I mean judges have

lifetime appointments in Federal court. We cannot cut their salary. And if they sit on a case, justice is denied.

Michelle and Melissa Davis in 1982, those two girls were killed. The aunt's boyfriend confessed. In 1992 the courts finished their review of the case. Today, 23 years later, after the girls were murdered, the case remains before the Federal District Court.

Michelle Malander, that case was she was kidnapped and murdered in '81. The case remains before the same Federal District Court where the appeals began in 1992.

Do you not think—and there are some other cases in which it—I will just ask you, sir, from Philadelphia there, you handle these cases regularly. Do you not think that it would be legitimate that the judges have a time limit that they have to rule on these cases one way or the other instead of just letting them sit, and does not this undermine the integrity of the legal system when we cannot get a decision?

Mr. DOLGENOS. Absolutely, Senator, and I see no other method for addressing those kinds of delays than through a congressional statute. And I think when you lower the innocence standard you are asking for more litigation into the future. I think when you eliminate the diligence requirement for discovery of evidence or presentation of evidence of innocence, you are again begging for these cases to go on further, longer, rather than shorter. I think we have to remember that ultimately these cases implicate victims who have been through a great deal, and it is important that we do not subject them to additional trauma here in Federal court.

Senator SESSIONS. Mr. Chairman, just briefly, Mr. Clay Crenshaw, who handles the appeals in the State of Alabama, they are sort of nemeses's. They go against one another a lot on these cases. He notes that on the Rule 32 appeal, this is like the Federal habeas, you have already had your direct appeal to the Alabama Supreme Court, may have often had an appeal to the Federal court system. Now you have a new claim of some kind you want to make in the State court as a post-conviction appeal. He reports in an affidavit he filed sometime ago that the attorneys representing these inmates, even though they may not be paid fully for this post-conviction, they have been paid to appeal but this post-conviction repetitious filing, the attorneys, 92 were out-of-state attorneys from large law firms who have given their time to this. The Equal Justice Initiative, that is Mr. Stevenson's group, has got 18 of the cases. Alabama attorneys, 17. Three of the cases are proceeding pro se.

There are attorneys representing most of these defendants, and if there is a good case there of innocence I think we have plenty of attorneys that are willing to represent them, even in these multiple appeals, post-conviction.

Chairman SPECTER. Thank you very much, Senator Sessions, and thank you, gentlemen, for coming in today.

Senator LEAHY. Could I ask just one more question?

Chairman SPECTER. Sure. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I wanted to follow up with things. I want to put in a statement from Senator Feingold and some other material if I might.

Chairman SPECTER. Without objection, all the statements will be made a part of the record.

Senator LEAHY. Just one for Mr. Stevenson. Section 6 of S. 1088 would strip Federal courts of jurisdiction to entertain claims going to a sentence. If the State courts decide that any error was not prejudicial, would not the State courts say that any errors with respect to a sentence is not prejudicial to preclude a Federal court from looking at those claims?

Mr. STEVENSON. Absolutely, and, Senator, in every ineffectiveness claim there is a prejudice standard which would in effect mean claims of ineffective assistance of counsel at the penalty phase, where the lawyers do nothing to present mitigation, would effectively be barred. One of the tragic things, the court has made a lot of progress in the last years, in my judgment, have declared you cannot execute people who are mentally retarded, you cannot execute people who are juveniles. But in many States there are no procedures in State court for making those proofs. This bill would again bar people who could prove mental retardation and other constitutional defects from review.

In all of those State court cases there is always the judgment that the claim is without merit, non-prejudicial, harmless, and I think it is a de facto bar on any kind of sentencing phase relief in Federal habeas.

Senator LEAHY. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Leahy.

Thank you gentlemen for coming in. This is obviously a matter of the utmost gravity, and the Committee will be considering it very, very closely.

Senator Kyl.

Senator KYL. May I have a little more time, Mr. Chairman?

Chairman SPECTER. Sure. I am going to have to excuse myself. We have a stem cell proceeding, press conference. We are coming to grips with stem cells, life instead of death, and that is scheduled at 11:30. Would you be willing to chair the hearing?

Senator KYL. Yes, I would be happy to, Mr. Chairman. Actually, in view of that, what I can do is just make a couple of closing comments here, put some questions in the record.

Chairman SPECTER. Fine.

Senator KYL. And you have indicated we are going to continue to work anyway, and we certainly have some expert advice that we can rely upon here.

Chairman SPECTER. Proceed.

Senator KYL. If you would just permit me then. It is clear from some of the testimony that there is some misunderstanding about both I think what we are trying to achieve, and also I think the actual provisions of the bill. I will just cite one example. We really have tried to provide a Federal court remedy where there has not been an exhaustion in State court where you have the clear and convincing evidence. If we have not accomplished that satisfactorily, I need to know that. But I think we have.

And so I want to be sure that the objections to the bill are actually based upon features of the bill rather than general concerns

that people might have about trying to modify the 1996 law just as a fundamental basis.

Secondly, you notice that we have two witnesses from Arizona today, and that is not by accident. Arizona has tried very, very hard, and Mr. Cattani noted it, under both Democrat and Republican Attorneys General and Governors, and State legislature, which has been mostly Republican, but certainly under the current Democratic Attorney General and his predecessors, we have tried very, very hard to meet the ability to have the expedited provisions to qualify under Chapter 154, for example, and gotten whacked down at every turn. I mean I will say it a little bit more bluntly than Mr. Cattani did. You heard from the testimony how far Arizona has tried to go here, and the Ninth Circuit still says, sorry, you do not qualify.

There are some things about the bill that are not working well, and I agree, Mr. Waxman, with you, or perhaps, Mr. Scheck, it was you who said that we need to have an analysis of exactly how the bill has worked. It is true, as Professor Stevenson said, that it is not necessarily the fact that the huge increase in petitions, the doubling of petitions, is due to the ineffectiveness of the Act, there are also a lot more cases pending. Undoubtedly that accounts for part of it.

So we do need to understand what effect the Act has had, but I think it is undeniable, from the testimony, for example, Mr. Dolgenos' testimony, that whatever the effect, it has not adequately addressed the problem of volume and delay here, when you have got cases anecdotally that go on for decades and you have to increase the number of people in the office just to handle these kind of petitions.

So clearly we have not yet solved the problem. There are problems and we need to solve them, and I want it clear here that in no way am I going to countenance any change in the law that results in a situation where somebody who is actually innocent cannot get his or her day in court. That is why we tried to build in this actual innocence exception. We may not have done it quite the way that some of you want us to do it, but that is my intention.

But there is something else that those of you who oppose the bill have to account for, and Mr. Waxman, you certainly addressed this point, justice delayed is justice denied. Our prosecutors and our courts are overburdened, and victims have rights too. When Christy Ann Fornoff's mother testified in the House—and I am not going to repeat the testimony here at this point—it makes you realize that we are not doing our job up here of providing a criminal justice system that meets the needs of our society. Some of you are focused strictly on the defendant, and I am glad you are because we can never let the innocent person be executed, for example.

But we also have to look at the rights of every victim of crime, and the obligation of society. And we are the decision makers here and we do have the constitutional right to legislate with regard to habeas corpus, there is no question about that. And therefore, I think after 9 years it is time to look at this and to acknowledge that it is not doing the job that we wanted it to do, that no State has qualified under Chapter 154, none.

Well, obviously something is wrong here. We tried to set up a situation where you could get expedited proceedings and it has not worked. So we do need to address this. We do need to deal with it. And I appreciate the testimony that all of you have provided. It is not all in agreement, but it is all in good faith, and it has all been edifying to all of us I am quite sure. Though the rest of you did not necessarily volunteer at the great rate that Mr. Waxman did, I suspect that all of you are available for continued consultation by the members of the Committee, and I for one am going to take you up on that because I appreciate your interest and your expertise in the area.

I just wanted to make that statement. I know we do not have another round here, but we will get some questions to you on the record, and I would appreciate the chance to continue to consult with all of you.

Thank you again, Mr. Chairman, for holding the hearing.

Chairman SPECTER. Thank you very much, Senator Kyl, for your initiatives on this very important subject, your leadership. It is obviously a matter of the utmost gravity, and we want to pursue it. We have some homework. A number of people have undertaken to do some follow-up work. Mr. Waxman has, to give us his expertise on trying to find an answer to the issue of delay, and at the same time being very sensitive to the issue of innocence. But we will be wrestling with this issue on the Committee, and we will be following up. I think it has been a very useful session with a lot of experience and a lot of knowledge here at the witness table today.

Thank you all very much.

[Whereupon, at 11:27 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

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QUESTIONS AND ANSWERS

To: Chairman Arlen Specter and the Members of the Senate Judiciary Committee
From: Kent Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office

Dear Senator Specter and Members of the Committee:

Thank you for the opportunity to respond to questions from members of the Committee regarding the Streamlined Procedures Act of 2005, S.B. 1088.

Preliminarily, having had time to think about questions raised by members of the Committee and to review the cases Barry Scheck and Seth Waxman encouraged Committee members to consider, I am persuaded that S.B. 1088 will improve the federal habeas system without adversely affecting prisoners who have legitimate claims of innocence.

Federal habeas reform is necessary. After 9 years under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), it is clear that the Act did not eliminate or even reduce the problem of delay in the federal habeas process. As evidenced by Attachment A, which is a chart of Arizona capital cases currently pending in federal court, 63 Arizona capital cases have been filed and remain pending since the effective date of the AEDPA. Of those cases, only one has advanced to the Ninth Circuit, where it has remained pending for the past 5 years. Thirteen pre-AEDPA cases remain pending in federal court; five of those cases have been in federal court longer than 15 years; the others range in time from 9.33 years to 14.08 years. A study by the Arizona Capital Commission in 2002 of every post-*Furman* Arizona capital case determined that the median time spent in federal court for cases prior to an execution was 8.8 years. Since then, there have not been any executions in Arizona, by the time of the next execution, the median time will obviously increase.

Twelve years in federal collateral review (following an approximately 6-year state court appellate process) is too long, particularly given the protections and resources that Arizona provides defendants in capital cases. S.B. 1088 would address this problem of delay, while maintaining the federal courts' ability to address legitimate claims of innocence.

QUESTIONS SUBMITTED BY SENATOR ARLEN SPECTER

1. **As I understand your testimony, one of the key components of AEDPA is a provision specific to capital cases only which is designed to accelerate the habeas process on the condition that states opt-in by enacting procedures to ensure effective capital representation of indigent defendants in state post-conviction relief proceedings. In exchange for opting-in, so to speak, the federal habeas process is expedited to no more than three years by virtue of accelerated briefing schedules and requirements placed on the courts to issue timely rulings. Is that a fair statement of existing law?**

Yes.

I am aware of all of the efforts of your state to "opt-in" and the ruling of the *Spears* case which ultimately found that Arizona qualified as an opt-in state, but ruled the opt-in procedures could not be invoked because of a delay in appointing counsel in the post-conviction proceeding. Are you aware of whether any state in the last 9 years, since AEDPA created the opt-in incentive, has successfully opted-in such that the expedited review is implemented?

I am not aware of any states that have successfully opted-in.

In Senator Kyl's bill, the courts are no longer responsible for determining whether a state has successfully opted-in, but instead the Attorney General of the United States would make such decisions. Is this a matter that should be taken from the courts and how will this impact the opt-in status of states?

In my view, proposed Section 9 of the SPA does not necessarily take this matter from the courts. Under the AEDPA, the decision whether a state has opted-in is made first by the district court, with review by the circuit court and ultimately by the United States Supreme Court. Under Section 9, the decision is made by the United States Attorney General, with review by the D.C. Circuit, and ultimately by the United States Supreme Court. Under either scenario, the Supreme Court makes the final determination whether a state has opted in.

After the Ninth Circuit ruled that Arizona would not be permitted to opt-in in the *Spears* case, the United States Supreme Court denied certiorari review. The Court would presumably have reached the same conclusion in *Spears* under the SPA procedure.

Notwithstanding the fact that the United States Supreme Court remains the final decision maker under either system, I believe the Section 9 proposal would be an improvement over the current provision. Some federal courts may be reluctant to take on the added burden that will result from an accelerated review process. Section 9 shifts the initial responsibility for determining the applicability of the accelerated review provisions to a decision maker who will not be subject to those provisions and thus would offer a neutral perspective. Additionally, having one person and one court make the decision would lead to greater uniformity in how cases are handled in the various circuits. States would have greater certainty regarding what type of system will satisfy the opt-in requirements. Accordingly, more states may attempt to opt in.

Providing a meaningful incentive for states to establish a system for appointing and adequately compensating competent counsel in post-conviction proceedings is good policy. Post-conviction proceedings provide an important opportunity to correct trial error. Those proceedings generally permit claims of

newly-discovered evidence and ineffective assistance of counsel, which should encompass and address any problem that may have occurred at trial.

Although I would welcome the application of "fast-track" provisions to Arizona capital cases, I would be satisfied with a system that permits non-expedited consideration of guilt/innocence claims, with a restriction on consideration of sentencing claims. The primary source of delay in Arizona capital cases in federal court is the reinvestigation of possible mitigating evidence. Because mitigation evidence is broadly defined, it is always possible for an attorney in federal court to discover "additional" mitigation. In my view, when a state provides qualified attorneys and funding for mitigation specialists at the trial stage, and provides an additional, highly qualified attorney, together with funding for a mitigation investigation, at the post-conviction stage, federal court investigation of mitigation evidence should be sharply curtailed. I encourage the Committee to consider restrictions on consideration of sentencing claims as part of the opt-in provisions.

QUESTIONS SUBMITTED BY SENATOR MIKE DEWINE

1. **Please review the attached lists of cases submitted by Barry Scheck and discuss whether you agree or disagree with his assessment of how those cases would have come out under the Streamlined Procedures Act of 2005, S. 1088.**

Mr. Scheck lists 7 cases involving "innocent people on death row granted relief in federal court who would have been executed had the 'Streamlined Procedures Act of 2005' been in effect:"(1) Ronald Keith Williamson – Oklahoma; (2) Nicholas Yarris – Pennsylvania; (3) Eric Clemmons – Missouri; (4) Ernest Willis – Texas; (5) Ricardo Aldape Guerra – Texas; (6) Curtis Kyles – Louisiana; and (7) Federico Martinez-Macias – Texas. Mr. Scheck also lists several United States Supreme Court cases he alleges would have been affected by the Streamlined Procedures Act (SPA).

A. *Innocent defendants*

I disagree with Mr. Scheck's assessment that the 7 listed defendants would not have been granted relief under the SPA. Preliminarily, in three of the cases (Willis, Guerra, and Kyles) Mr. Scheck asserts only that federal review would have been barred if the state had "opted in" under Section 9 of the SPA by creating a mechanism for the appointment of competent counsel in state post-conviction proceedings. Section 9 as originally proposed would accelerate the federal review process in opt-in cases and would limit the scope of review to (1) claims involving clear and convincing evidence of innocence that could not have been discovered previously through the exercise of due diligence, and (2) claims asserting a retroactive change in United States Supreme Court law. The current proposal for Section 9 would accelerate review, but permit review of non-procedurally defaulted claims.

Under the current version of Section 9, Mr. Scheck's arguments have been rendered moot because the proposed scope of review is the same as for non-capital cases and permits review of non-procedurally defaulted claims. Furthermore, even under the originally proposed version, Mr. Scheck's arguments were unavailing because none of the cases involved an allegation that the state had opted in under the similar opt-in provision of the AEDPA. The point of opting in is to provide a more thorough review of post-conviction issues in state court, in exchange for a more limited review in federal court. If the states involved in any of the above-cited cases had attempted to opt-in, the state court proceedings would presumably have been different, with the defendant receiving a more thorough review of his claims in the state post-conviction proceeding. Post-conviction proceedings provide an opportunity to develop claims of ineffective assistance of counsel and newly discovered evidence. Because the state post-conviction proceedings would presumably have been more thorough, Mr. Scheck's analysis is based on a faulty premise. Absent an indication that any of the states in question attempted to opt-in, it should be clear that the Section 9 jurisdictional bar would not have applied to prevent federal review in any of 7 listed cases.

I also disagree with Mr. Scheck's assessment that other provisions of the SPA would have barred relief in these cases. A review of the listed cases instead demonstrates that the SPA would *not* have precluded federal habeas relief in cases involving legitimate claims of innocence.

Ronald Keith Williamson – Oklahoma

Mr. Scheck first asserts that relief would have been unavailable for Williamson under Section 4 of the SPA, which would remove jurisdiction to consider procedurally defaulted claims. However, the federal courts granted relief based on multiple claims, most of which were not procedurally defaulted and thus would have provided a basis for relief, even under the SPA. Mr. Scheck appears to have based his procedural default analysis on state procedural bars that were imposed because Williams had already raised a claim, not because he failed to timely assert it. A state procedural bar based on the claim having been previously raised does not preclude federal review.

Mr. Scheck's second assertion—that ineffective assistance of counsel claims would not have been permitted under the "opt-in" provisions of Section 9 of the SPA—has been rendered moot by the modifications to Section 9 and is in any event unpersuasive because Oklahoma did not allege opt-in status under the AEDPA. Absent an attempt by Oklahoma to opt-in, Section 9 could not possibly have applied to this case, even under the originally-proposed version of Section 9. Any discussion about what might have happened is speculative and ignores the fact that the underlying state court proceedings would have been different had this been an opt-in case.

The claims on which the federal courts granted Williamson relief are as follows:

1. *Ineffective assistance of counsel.*

Williamson alleged that his counsel was ineffective for failing to investigate competency and had a continuing obligation to ask that the proceedings be suspended as counsel became aware of facts sufficient to raise a doubt as to Williamson's competency during any stage of the criminal proceedings. *Williamson v. Reynolds*, 904 F. Supp. 1529 (1995), *see* headnotes 1, 2, 4, and 5. The state court addressed the merits of Williamson's claim "that he was denied effective assistance of counsel during the first stage of trial by counsel's failure . . . to fully investigate and utilize evidence of [Williamson's] mental illness." *Williamson v. State*, 812 P.2d 384, 412 (1991). There is no discussion of any procedural bar; the state court rejected the ineffective assistance claim on the merits. 812 P.2d at 411 – 415. Thus, the claim of ineffective assistance of counsel for failure to investigate and utilize evidence of Williamson's mental illness was preserved for federal review, even under the SPA.

Portions of the ineffective assistance claim presented in federal court would presumably be jurisdictionally barred under the SPA if they were not presented to the state court. Williamson appears to have presented additional evidence in federal court and/or presented additional argument in federal court regarding this claim. For example, the state court decision does not discuss trial counsel's duty to raise Williamson's competence at the time he gave his "dream confession," which is something the federal court found to be of great significance. *See* 904 F. Supp. at 1545.

Although the federal district court did not specify whether it would have reached the same conclusion without the additional affidavits presented in federal court, it is clear that Williamson extensively developed the underlying claim of ineffective assistance in state court, and the district court made clear that "[d]ue to the magnitude of the constitutional violations in Petitioner's case, viewed either individually or in combination, this court has no doubt that there was substantial and injurious effect or influence upon the jury's verdict." 904 F. Supp. at 1576. Additionally, the Tenth Circuit made clear that trial counsel's affidavit, which was part of the state court record, was enough to warrant relief on this claim: "We are convinced that [counsel's] observations of Mr. Williamson's demeanor before and during the court proceedings, coupled with the scant documentary evidence of Mr. Williamson's mental condition that [counsel] did obtain, would have prompted a reasonable attorney in a capital case to investigate further before deciding to forego a competency determination." *Williamson v. Ward*, 110 F. 3d 1508, 1518 (10th Cir. 1997).

The claims relating to headnotes 6, 7, and 8 in the district court opinion alleged counsel's failure to present mitigation evidence at sentencing. Williamson raised those claims in state court, *see* 812 P.2d at 413-15; the affidavits attached in the federal proceeding pre-date the state appellate proceedings and appear to have been presented in state court. *Compare* 904 F. Supp. at 1545-46, *with* 812 P.2d at 414-15. Thus, this aspect of the ineffective assistance claim would not have been jurisdictionally barred under the SPA.

The claims relating to headnotes 13, 14, and 15 in the district court opinion alleged ineffective assistance based on counsel's failure to investigate two witnesses and the failure to introduce a confession by Ricky Simmons after Williamson was charged with the crime. 904 F. Supp. at 1549-1552. The state court specifically addressed the merits of an ineffective assistance claim based on Simmons' confession. 812 P.2d at 412. Thus, this aspect of the ineffective assistance of counsel claim would not have been jurisdictionally barred under the SPA. The federal courts disagreed with the state court's conclusion regarding this claim and found that "a reasonable probability exists that the outcome of the trial would have been different if the jury had been able to consider another confession to the crime that was as convincing as that of Mr. Williamson." 110 F.3d at 1522.

2. *Due process required the state to provide a forensic expert.*

Williamson raised this claim on direct appeal. 812 P.2d at 395-96. The state court did not find the claim to be precluded. The federal district court addressed the merits of the claim with no suggestion of procedural default. 904 F. Supp. at 1558-1562. The court found constitutional error. *Id.* at 1562. This claim would not have been jurisdictionally barred under the SPA.

3. *The prosecutor's suppression of a videotaped interview of petitioner denied due process.*

Williamson raised this claim in state court; the state court found that the suppressed videotape was not material to Williamson's defense. *Williamson v. State*, 905 P.2d 1135, 1136 (Okla. Crim. App. 1991). The federal court decision disagrees with the merits of the state court ruling. 904 F. Supp. at 1543-64. This claim would not have been jurisdictionally barred under the SPA.

4. *Evidence of a full day of drug and alcohol ingestion before the murder entitled petitioner to an instruction on first-degree manslaughter.*

Williamson raised this claim in state court on direct appeal; the court rejected it on the merits and found that such a defense was barred by the statute of limitations. 812 P.2d at 399. The federal district court disagreed and held that because Williamson was not given a choice between having the benefit of the lesser-included offense instruction or asserting the statute of limitations on the lesser included offense, "the conviction must be reversed." 904 F. Supp. at 1566-67. This claim would not have been jurisdictionally barred under the SPA.

5. *Williamson was deprived of his due process right to have a meaningful opportunity to deny or explain evidence presented in aggravation.*

The state court ruled that Williamson's failure to object at trial resulted in a waiver of all but fundamental error. Under the SPA, this claim would have been jurisdictionally barred.

6. *Giving one day's notice of aggravating circumstances to support death penalty was a denial of due process.*

Same as 5.

7. *The aggravating circumstance of murder to avoid arrest or prosecution was applied in arbitrary and capricious manner.*

Williamson raised this claim on direct appeal and the state court addressed it on the merits. 812 P.2d at 406-07. This claim would not have been jurisdictionally barred under the SPA.

Conclusion: Based on the federal courts' rulings favorable to Williamson on multiple non-procedurally defaulted claims, it is clear that even under the SPA, Williamson would have been granted relief in federal court.

Nicholas Yarris – Pennsylvania

The record does not support Mr. Scheck's assertion that Yarris would have been executed instead of released had his case been subject to the SPA. It is impossible to say what would or would not have happened in this case because Yarris obtained relief in state court while his federal habeas petition remained pending. Yarris' first federal habeas petition, filed in 1996, was dismissed *without prejudice*, to give Yarris an opportunity to pursue unexhausted claims in state court. Yarris' second federal petition, filed in October 1999, contained both procedurally defaulted claims and claims that were properly before the court. *See Yarris v. Horn*, 230 F. Supp. 577, 579 (E.D. Penn. 2002) ("Respondents answered that none of petitioner's claims entitles him to relief since most of the claims are procedurally defaulted, and the claims that are properly before this court are meritless."). The district court's ruling regarding the second petition addresses only the issue of procedural default (holding in favor of Yarris and rejecting a claim that the procedurally defaulted claims should not be addressed on the merits). The district court decision does not list all of the claims raised in federal court. Yarris exhausted some federal claims in his direct appeal, *see Pennsylvania v. Yarris*, 549 A.2d 513 (Pa. 1988), and those claims would not have been barred under the SPA. Accordingly, there is no way to know what would have happened if the federal court had rejected all procedurally defaulted claims and addressed the merits of the non-defaulted claims. What we do know based on *Yarris* is that there is a mechanism in Pennsylvania that allows for presentation of newly-discovered DNA results in state court.

Mr. Scheck's assertion regarding the changes to the opt-in provisions under Section 9 of the SPA (which is moot under the current version of the bill) is based on an incorrect and speculative premise. Pennsylvania did not allege opt-in status. Thus, this would not be an opt-in case, even under the SPA. Moreover, there is no way of knowing what claims might have been raised had Pennsylvania established a system to ensure a more thorough review of post-conviction claims.

Eric Clemmons – Missouri

While serving a life sentence for murder, Eric Clemmons was charged with murdering an inmate who had been his cellmate. He was convicted of murder and sentenced to death. The Missouri Supreme Court affirmed his convictions and sentences in 1988. *State v. Clemmons*, 753 S. W. 2d 901 (Mo. 1988). In 1997, the Eighth Circuit granted relief on two federal habeas claims: (1) a *Brady* violation relating to a statement taken shortly after the murder from an inmate who claimed that another inmate had committed the murder, and (2) a Confrontation Clause violation because Clemmons did not personally consent to the admission of deposition testimony taken from a witness for the State when Clemmons was not present. The district court found that the two claims were procedurally defaulted, but the Eighth Circuit reversed, finding that Clemmons fairly presented the *Brady* claim in state court. *Clemmens v. Delo*, 124 F.3d 944, 948-49 (1997).

Clemmons had raised the *Brady* claim in state court in a pro-se supplemental brief, which Mr. Scheck incorrectly asserts "the Missouri Supreme Court refused to consider." The Missouri Supreme Court opinion Mr. Scheck cites, *Clemmons v. State*, 785 S.W. 2d 524, 527 (Mo. 1990), states as follows regarding its consideration of the pro-se brief:

> The trial court accorded an evidentiary hearing on all points presented by the *pro se* and first amended motions; and on February 21, 1989, entered findings of fact and conclusions of law in denial of all such points and allegations.
>
> Arguably, the points presented by the first amended motion were time-barred under the first sentence of Rule 29.15(f) because of the failure to file the amended motion within 30 days of counsel's appointment.
>
> It is at least equally arguable that the first amended motion was timely filed because of the extension granted under the authority given the trial court in the second sentence of Rule 29.15(f).
>
> Because of this ambiguity in Rule 29.15(f) and its application in this case, *this Court resolves the resulting dilemma in favor of full review of all points presented by the pro se and first amended motions.*

(Emphasis added.) Accordingly, Clemmons' *Brady* claim was not procedurally defaulted and would not be barred from consideration under the SPA.

It is worth noting that the Eighth Circuit decision did not exonerate Clemmons, and in fact the court noted that "the State's case would have remained strong even with the new evidence." 124 F.3d at 951. Compelling evidence linked Clemmons to the murder, including Clemmons' dislike of the victim (his former cellmate) and his

statement after the murder that "I guess they got me." 785 S.W. 2d at 528; 100 F.3d at 1396. Blood consistent with that of the victim was found on Clemmons' hat and on a book he was seen carrying shortly after the stabbing. 100 F.3d at 1396. Clemmons' defense, through testimony from other inmates, was that the victim ran into him after he had been stabbed by someone else. *Id.* Upon retrial in 2000, a jury acquitted Clemmons some 15 years after the crime. In a case like this, it is difficult to gauge which of the verdicts was more reliable.

Under the more accelerated review contemplated by the SPA, Clemmons would have been granted relief, but the re-trial would have occurred closer to the time of trial. That would have been better for everyone involved in the criminal justice system.

Ernest Willis – Texas

The SPA would not have changed the result in this case. Willis was convicted of murder by arson. The state trial court overturned his conviction, but the state court of criminal appeals reversed that decision. The federal court granted relief based on non-procedurally defaulted claims. The State of Texas stipulated that the merits of the claims at issue were properly before the federal court:

> At the outset, the Court notes that the posture of this dispute, cross-motions for summary judgment, indicates the parties' *agreement* that the state trial court's post-conviction findings of fact are properly before this Court on habeas review.

Willis v. Cockrell, 2004 WL 1812698, at * 3 (W.D. Tex. Aug. 9, 2004) (emphasis added). Accordingly, Section 4 of the SPA would not have changed the result in this case, and Willis would have been granted relief on his federal constitutional claims.

Mr. Scheck's suggestion that Section 9 of the SPA would have precluded review is speculative and unpersuasive because Texas has not attempted to opt in under the AEDPA. Thus, Section 9 would not have applied to this case. Furthermore, even if Section 9 had applied to this case, it appears that Willis' claim of actual innocence would not have been precluded because evidence that someone else (David Long) confessed to setting the fire in question did not surface until after Willis' conviction:

> Initially, Long only told [the supervisor of Psychiatric Services at the prison] that there was an inmate on death row who Long knew was innocent because that inmate had been convicted of a crime Long had committed.

2004 WL 1812698 at * 9. Because Section 9 provides for consideration of claims of newly-discovered evidence of innocence in opt-in cases, Willis' innocence claim would have been properly before the federal court as newly-discovered evidence of innocence even under the SPA.

Ricardo Aldape Guerra – Texas

The SPA would not have changed the result of this case. Mr. Scheck does not allege that Guerra's claims would have been jurisdictionally barred because of procedural default. There is no mention of procedural default in the district court opinion granting federal habeas relief, *Guerra v. Collins*, 916 F. Supp. 620 (1995), or in the Fifth Circuit opinion upholding that decision, *Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996). Accordingly, the SPA would not have changed the outcome of this case.

Mr. Scheck alleges that if Texas were an opt-in state, Guerra's claims would have been barred under Section 9. Because Texas has not attempted to opt-in under the AEDPA, that assertion is based on an incorrect and speculative premise.

Curtis Kyles – Louisiana

Mr. Scheck alleges only that Section 9 of the SPA would have stripped the federal courts of jurisdiction to review Kyles' claims. Because Louisana is not an opt-in state, that assertion is based on an incorrect and speculative premise.

Mr. Scheck states the SPA would have stripped all federal courts "including the United States Supreme Court" of jurisdiction to review Kyle's claims of ineffective assistance of counsel. That assertion overlooks the fact that the United States Supreme Court has jurisdiction to review a state court ruling regarding ineffective assistance on direct review or following a state post-conviction proceeding. *See* U.S.S.Ct.R. 10(c) (the Court has discretion to consider a decision by a state court of last resort that "decided an important question of federal law that has not been but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court").

Federico Martinez-Macias – Texas

Mr. Scheck again alleges only that Section 9 of the SPA would have stripped the federal courts of jurisdiction to review Martinez-Macias' claims. Because this was not an opt-in case, the assertion is based on an incorrect and speculative premise.

B. *Supreme Court Cases Affected by the SPA*

I agree with Mr. Scheck that the SPA would affect United States Supreme Court jurisprudence. The Court is charged with interpreting congressional enactments. If Congress chooses to alter some of its own previous enactments, such as the federal habeas statute (18 U.S.C. § 2254), the Court would interpret the newly amended statute. There is nothing extraordinary or sinister in Congress amending a statute to correct flaws.

The list of Supreme Court decisions that would be affected by the SPA is, in my view, of less concern than the list of cases in which an innocent petitioner might be

denied relief in federal court. The important question is not whether some Supreme Court cases interpreting the current federal habeas statute will be affected by enactment of the SPA, but rather whether the SPA would materially change the likelihood of an innocent person being denied relief. Given the fact that the SPA would not have changed the outcome in the cases cited in Mr. Scheck's first list, and given the fact that the SPA specifically provides for consideration of procedurally defaulted claims that establish actual innocence, a change in the applicability of some Supreme Court cases should not be troubling.

The first case cited by Mr. Scheck, *Rhines v. Weber*, 125 S. Ct. 1528 (2005), provides an example of why changes to the current federal habeas statute are warranted. *Rhines* permits substantial delay in the federal habeas process by allowing federal district courts to stay proceedings involving a habeas petition containing both exhausted and unexhausted claims to allow the petitioner to present the unexhausted claims to the state court. This procedure effectively circumvents the 1-year statute of limitations that Congress found appropriate for the filing of federal habeas petitions. By enacting a 1-year statute of limitations, Congress obviously intended to reduce delay. Allowing a petitioner to file a federal habeas petition that includes both exhausted and unexhausted claims, then permitting the petitioner to stay the proceedings to return to state court to exhaust the unexhausted claims is inconsistent with having a statute of limitations.

The SPA would not "overturn" United States Supreme Court rulings. Instead, it would change the parameters of a statutory system (18 U.S.C § 2254) Congress created. I agree with Mr. Scheck that cases involving, for example, an interpretation of what constitutes "cause" to excuse a procedural default would no longer be relevant. The SPA changes the focus of federal habeas review to a consideration of non-procedurally defaulted claims, with an exception that allows for consideration of procedurally defaulted claims if they establish actual innocence. The SPA would thus significantly reduce delay, while still providing for consideration of legitimate claims of innocence.

2. Please review the four cases cited by Seth P. Waxman in his testimony before the Committee on the Judiciary and discuss whether you agree or disagree with his assessment of how those cases would have come out under the Streamlined Procedures Act of 2005, S. 1088.

I agree with Mr. Waxman's assessment that the SPA could affect United States Supreme Court case law. For reasons set forth above, a change in a statute the Court is interpreting will necessarily result in changes to the Court's jurisprudence. Regarding to the four cases Mr. Waxman discusses, I disagree that the SPA's effect on those cases would undermine the preservation of fundamental rights in our criminal justice system.

***Miller-El v. Dretke*, 125 S. Ct. 2317 (2005)**

In *Miller-El*, the United States Supreme Court granted federal habeas relief on the basis that Texas prosecutors improperly used peremptory challenges to exclude black

jurors from the voir dire panel. 125 S. Ct. at 2340. Miller-El had been convicted of capital murder after he shot two hotel employees during a Holiday Inn robbery in Dallas, Texas in 1985. *Id.* at 2322.

Mr. Waxman's primary argument regarding this case is that under Section 9 of the SPA, the voir dire challenge based on *Batson v. Kentucky*, 476 U.S. 79 (1986), would have been jurisdictionally barred under the SPA. For reasons discussed previously, that argument is now moot. Furthermore, because Texas did not allege "opt-in" status, Section 9 would not apply. Consideration of the claim would not have been barred under Section 4 of the SPA because Miller-El presented the *Batson* claim in state court. *Id.* at 2323. There was no procedural bar, and this claim would not have been jurisdictionally barred.

I agree with the Court's holding that prosecutors should not use peremptory challenges to systematically remove minorities from a venire panel. However, the SPA would not have precluded the Court from making that holding in this case as part of the federal habeas proceeding. Furthermore, even if Texas had "opted-in" under Section 9, the Court could have considered the claim on direct review from the Texas Court of Criminal Appeals, rather than waiting for a federal collateral appeal. That approach would have significantly reduced the almost 20-year time period that elapsed between Miller-El's conviction and the granting of federal habeas relief.

***Banks v. Dretke*, 540 U.S. 668 (2004)**

Neither Section 2 (requiring the dismissal of unexhausted claims), Section 3 (restricting amendments to the habeas petition), nor Section 4 of the SPA would have prevented federal review of Banks' *Brady* claim. Banks raised his *Brady* claim in a 1992 state-court habeas application in which he alleged that "the prosecution knowingly failed to turn over exculpatory evidence" that "would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a set-up." 540 U.S. at 682. The Supreme Court noted that, "Banks's third state post-conviction motion, filed January 13, 1992, presented questions later advanced in federal court and reiterated in the petition now before us." *Banks*, 540 U.S. at 682. Thus, Banks sufficiently exhausted his *Brady* claim in state court to permit federal court review. The restriction on amendments under Section 3 would not have applied because of the 18 U.S.C. § 2244(b)(2) exception for claims that could not have been developed through due diligence (the state had previously told Banks it had provided all relevant *Brady* material). Thus, the SPA would not have changed the result.

Mr. Waxman's assertion that Section 9 of the SPA would have barred relief is moot under the current version of Section 9. Even under the originally proposed version of Section 9, the argument is unpersuasive because Texas did not allege that it had opted-in under the AEDPA.

Mr. Waxman suggests that the only safeguard to address prosecutorial misconduct is federal habeas corpus. In my view, the availability of habeas corpus was not the determining factor that led to relief being granted in this case. First, the federal habeas

process does not inherently guarantee that undisclosed documents will be disclosed. I suspect that the reason for disclosure of the documents in the federal proceeding is that different governmental agencies handle state court proceedings and federal court proceedings in Texas capital cases. (A local prosecution agency handles state court proceedings; the Texas Attorney General's Office handles the federal proceedings.) The availability of federal habeas does not alter the requirement that *Brady* material be turned over; that requirement already exists. Second, the United States Supreme Court could have addressed Banks' *Brady* claim had Banks pursued certiorari review from the denial of his 1992 state post-conviction proceedings. The substance of the claim raised in the post-conviction proceeding, together with the State's failure to specifically deny having made a deal with Farr, would have provided a basis for granting relief on certiorari review.

***Wiggins v. Smith*, 539 U.S. 510 (2003)**

Wiggins ransacked a 77-year old woman's apartment and drowned her in her bathtub. 539 U.S. at 514. He was convicted of first-degree murder, robbery, and theft in 1988. The United States Supreme Court granted relief on an issue relating only to sentencing—trial counsel's failure to investigate and present mitigating evidence. *Id.* at 519. Trial counsel chose not to present mitigating evidence (including evidence of an excruciatingly bad childhood) and instead tried to convince a jury that Wiggins was not guilty of the crime. (Williams had been convicted in a trial before a judge). *Id.* at 517-19.

I agree with Mr. Waxman that if Maryland had opted in under the originally proposed version of Section 9, the ineffective assistance claim would be jurisdictionally barred. However, Maryland did not attempt to opt-in, so Section 9 would not have been implicated. The ineffective assistance claim was not procedurally barred and thus would not have been jurisdictionally barred under Section 4 of the SPA. Furthermore, the evidence on which the Supreme Court relied in granting relief was presented as part of the state post-conviction proceeding. Accordingly, even if Section 9 were applicable and created a jurisdictional bar, the Supreme Court could have reviewed the claim on direct review from the state court's denial of relief in the post-conviction proceeding.

***Lee v. Kemna*, 534 U.S. 362 (2002)**

I agree that Remon Lee may not have been entitled to federal habeas relief in this case under the SPA. However, given the fact that the only federal court to grant relief was the United States Supreme Court, and given the fact that the Court could have made the same ruling following the denial of Lee's direct appeal (Lee apparently never sought certiorari review), I disagree that this case provides a compelling basis for concluding that adopting the SPA would result in an injustice in the criminal justice system.

Lee was convicted in 1994 of first-degree murder and sentenced to life in prison for his role as the alleged getaway driver of a truck waiting to pick up Reginald Rhodes after Rhodes shot and killed Steven Shelby on a public street in August 1992. At the time

of trial, Lee had already been sentenced to 80 years in prison for another offense. *Lee v. Kemna*, 2004 WL 157555, at *1 (W.D. Mo. July 8, 2004) (unpublished decision).

Lee had planned to present an alibi defense—that he was in California with his family at the time of the murder. 534 U.S. at 367. On the final day of trial, Lee's three alibi witnesses (his mother, stepfather, and his sister) left the courthouse, apparently without talking to him. Lee asked the court for a recess or continuance in order to locate the family members. The trial court concluded the witnesses had abandoned Lee and denied the continuance request.

In a post-conviction relief proceeding, Lee asserted that the three witnesses had left the courthouse because "an unknown person," whom he later identified as an employee of the prosecutor's office, had told them "they were not needed to testify." *Lee v. Kemna*, 534 U.S. at 371. The trial court denied relief, and review from that decision was consolidated with Lee's direct appeal. The Missouri Court of Appeals denied relief, ruling that the trial court "could properly have denied the oral motion for a failure to comply with Rule 24.09 [a state procedural rule requiring written motions]." 534 U.S. at 373. The state court further ruled that, even assuming the oral motion was adequate, the request "was made without the factual showing required by [Missouri Supreme Court] Rule 24.10," which requires a showing of materiality of the evidence sought to be obtained and an indication of what particular facts the witness will prove.

Lee did not seek certiorari review in the United States Supreme Court, but he filed a petition for writ of habeas corpus in federal court. Lee appended affidavits from his three potential witnesses; each avowed that they left the court because a "court officer" told them their testimony would not be needed. The district court rejected the habeas petition and found that the affidavits could not be considered because they were not offered in state court. The Eighth Circuit found Lee's claim procedurally defaulted because his motion to continue did not comply with state law (Missouri Supreme Court Rules 24.09 and 24.10), and upheld the denial of relief. *Lee v. Kemna*, 213 F.3d 1037, 1038 (8th Cir. 2000).

The United States Supreme Court reversed, finding that "this case falls within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim." 534 U.S. at 381. The Court stated that "[a]lthough the judge hypothesized that the witnesses had "abandoned" Lee, he had not "a scintilla of evidence or a shred of information" on which to base this supposition." *Id.* (quoting 213 F.3d, at 1040 Bennett, C.J., dissenting). The Court ruled that Lee had "substantially complied with Missouri's rules of procedure, and granted relief because "[w]here it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect in form must be more evident than it is here." 534 U.S. at 382, 385 (quoting *James v. Kentucky*, 466 U.S. 341, 351 (1984)).

In dissent, Justice Kennedy noted that it was not clear that Lee's witnesses were in fact willing to provide testimony that would have helped Lee:

> When Lee's witnesses were then reported missing, the judge had ample reason to believe they had second thoughts about testifying. All three of Lee's family members had traveled from California to testify, but all three left without speaking to Lee or his lawyer. Two sets of witnesses, four persons in all, had just placed Lee in Kansas City; and the prosecution had said it had in reserve other witnesses prepared to rebut the alibi testimony. Lee had been sentenced to 80 years in Missouri prison for an unrelated armed assault and robbery, and any witness who was considering perjury would have had little inducement to take that risk—a risk that would have became more pronounced after the prosecution's witnesses had testified—if Lee would serve a long prison term in any event. The judge's skepticism seems even more justified when it is noted that six weeks later, during a hearing on Lee's motion for a new trial, counsel still did not explain where Lee's family members had gone or why they had left. It was not until 17 months later, in an amended motion for post-conviction relief, that Lee first gave the Missouri courts an explanation for his family's disappearance.
>
> . . .
>
> No one—not Lee, not his attorney—stood before the court and expressed a belief, as required by Rule 24.10, that the missing witnesses would still testify that Lee had been in California on the night of the murder. Without that assurance, the judge had little reason to believe the continuance would be of any use. . .
>
> In sum, Rule 24.10 served legitimate state interests, both as a general matter and as applied to the facts of this case. Lee's failure to comply was an adequate state ground, and the Court's contrary determination does not bode well for the adequacy doctrine or federalism.

534 U.S. at 404-05.

On remand to the district court, the court granted habeas relief and ordered that Lee's conviction be set aside unless the State chose to retry him within a specified period of time. 2004 WL 1575555 at * 6. The district court nevertheless noted the vagueness of the testimony provided by the family members in videotaped depositions. For example, Lee's stepfather testified that he remembered specifically that Lee was in California for certain birthdays in July and the birth of a niece in October, and that it was his impression that Lee was there from July through October. He acknowledged that he did not keep "close tabs" on Lee. The district court judge stated that, even after considering the videotaped deposition testimony, "it does seem doubtful that an alibi for late August 1992 had been particularly well established by this testimony. It seems weak in light of the contrary proof by the victim's sister and a neighbor, both of whom knew Lee, that they saw him with the killer the night before the homicide, looking for the victim." *Id.* at * 5. The judge further stated that "[t]here is nothing to support suspicion that the prosecution

was responsible" for asking the bailiff to release the witnesses, and the judge noted his belief that it was more likely that defense counsel had instructed the bailiff to do so. *Id.*

There are no further published decisions detailing whether the state chose to retry Lee. This is clearly not an exoneration case, and it would be interesting to know the ultimate resolution of the case in state court following the granting of federal habeas relief.

In any event, this case does not provide a compelling basis for rejecting the SPA. The United States Supreme Court could have addressed the same issue on direct appeal from the state court. Thus, regardless whether the Supreme Court should or should not have granted habeas relief, it could have done so earlier had Lee pursued relief following the denial of his combined post-conviction and direct appeal proceedings in state court.

CONCLUSION

The AEDDPA has not solved the problem of delay in federal habeas proceedings. The SPA provides a reasoned approach that will restore balance between the state and federal courts by reducing delay in the federal process while at the same time preserving the right to raise claims of innocence. A careful analysis of the cases cited above demonstrates that the SPA will not preclude relief in cases involving legitimate claims of innocence. In my view, the SPA is both necessary and proper.

ANSWERS TO WRITTEN QUESTIONS
FROM SENATOR SPECTER
"Habeas Corpus Proceedings and Issues of Actual Innocence"
Hearing of July 13, 2005

Tom Dolgenos, Chief of Federal Litigation
Philadelphia District Attorney's Office

1. I believe that state criminal convictions are entitled to respect in federal habeas, and that questions of guilt should not lightly be re-litigated in federal court. Generally, wide-open federal review violates the principle that states must have the sovereign power to make and enforce their own criminal laws. More practically, re-litigation does not ensure reliability – the opposite is often true. As time passes, memories fade, and it becomes harder to get at the truth. Finally, federal court re-litigation places severe strains on the resources of local prosecutors, who must put a case on trial twice (or three or four times) rather than once.

A case like House v. Bell, 547 U.S. 518 (2006), illustrates some of these problems. First, I should say that under the proposed SPA I believe the Supreme Court would have reached the same conclusion – allowing this defendant to proceed with full habeas review because he successfully met the innocence standard. (The SPA innocence standard is mostly unchanged from the current "actual innocence" gateway for habeas claims.)

This was not my case – it arose in Tennessee – but from the published opinions, there is clearly room for disagreement about this case, and the difficulty does not arise from the strictness of the "actual innocence" standard. That is, the judges who have heard this case have not been prevented from granting relief by an unjust standard of review. Rather, the judges who have reviewed this case, in state and federal court, simply disagreed on the persuasiveness of the "new" evidence, and whether it overwhelms the evidence that the jury heard at trial.

Briefly, the petitioner in House relied on four kinds of evidence to support his claim of innocence in federal court: (1) inconsistencies in the testimony of an eyewitness who saw House near the body; (2) newly discovered witnesses who say that the victim's husband confessed to the crime many years ago; (3) new DNA testing that links the semen found on the victim's nightgown to the victim's husband, rather than House; and (4) evidence that the victim's blood was smeared on House's pants during the police investigation, rather than during the murder or its cover-up. The first of these – the inconsistencies in eyewitness testimony – might simply be garden-variety second-guessing of witnesses; because House admits he was at the scene, these inconsistencies may prove little anyway. The second category of new evidence consists of the two witnesses who say they heard the husband confess. But the district court heard these witnesses, and found they *were not credible*, both because they waited more than ten years before coming forward, and because the details of the supposed confessions did not fit the physical evidence. As for the DNA tests, the presence of the husband's semen on his wife's nightgown does not mean that he killed her. The jury was aware that the sperm could have been from the husband or from House; while the prosecutor suggested in his closing argument that the semen was probably from House, the new results do not make the entire prosecution's case evaporate. Finally, the blood evidence (and the attendant battle of experts) is not clear-cut. In fact, a large part of the defense argument depends on the possibility that law enforcement authorities intentionally smeared the blood on House's pants, which seems far-fetched, and many scientists have apparently publicly disagreed with the defense expert's "smearing" conclusion.

If the House trial were held today, plainly the defense could use the new arguments to attack the prosecution's case. And as the majority on the Sixth Circuit acknowledged, all of this may raise a "colorable" claim of innocence. But I do not believe it is feasible to retry criminals, or hear new claims, every time a prisoner can raise a "colorable" claim of innocence. As I said in my original testimony, such a low standard which would invite endless litigation, because almost all prisoners can raise a "colorable" claim of innocence even after they have been convicted. The innocence standard must be higher than that.

The Sixth Circuit majority believed that "the case against House remains strong," 386 F.3d at 685. That is the same conclusion reached by the district court, and by the Tennessee state courts. The Sixth Circuit dissenters disagreed, and five Supreme Court justices disagreed as well. But this disagreement among good-faith jurists does not mean that the standard is wrong; it simply means that different judges, using the same workable standard, have come to different conclusions. That kind of disagreement is inevitable in our system; in fact, that is why we rely so much on juries in the first place – to decide between different plausible interpretations of the evidence.

I believe it is important to provide defendants and prosecutors with access to DNA testing, and that this should be done as early in the process as possible, so that truly innocent defendants are not subject to wrongful prosecution. If the results are not decisive one way or the other, the jury can assess the results. If after-trial DNA testing proves truly exculpatory, then the SPA provides a clear remedy. In fact, I believe that an innocent prisoner will likely do better under the SPA than under current habeas law, because many of the non-innocence-related claims will be brushed away, and the federal courts can focus more attention on the really compelling cases. As for claims of innocence that are merely "colorable," it should be up to the states to decide whether these cases should be relitigated; automatic federal review of such cases would make federal habeas proceedings the "main event" and would require a dramatic re-working of local prosecutions.

2. In my experience, it is not true that AEDPA-related litigation is slowing down; on the contrary, it remains steadily high. In my unit, for example, last year we fully briefed about 20 cases in the Third Circuit, whereas before AEDPA (before I became involved in habeas work) this unit would normally litigate only one or two such appeals every year. Further, I believe that the problem is not that AEDPA is complicated or vague or needs interpretation, but rather that there are so many judicially-created exceptions to AEDPA's various restrictions that almost every rule must now be litigated before it is applied. For example, most untimely petitions now trigger an "equitable tolling" argument. Or, to take another example, many petitioners currently attempt to

evade AEDPA's deferential standard of review by arguing that the state courts did not *really* decide their claims, so there is nothing to defer to. These are the kinds of questions that we routinely litigate now, and I do not anticipate fewer such arguments without changes to the statute.

The SPA addresses these issues, closes loopholes, and ultimately I think it will reduce litigation.

ANSWERS TO WRITTEN QUESTIONS
FROM CHAIRMAN LEAHY
"Habeas Corpus Proceedings and Issues of Actual Innocence"
Hearing of July 13, 2005

Tom Dolgenos, Chief of Federal Litigation
Philadelphia District Attorney's Office

1. When state courts throw out a prisoner's claims based on a state procedural rule, that is, of course, a matter of state law. Even now, federal courts do not have the power to ignore state procedural rulings because it is, in the opinion of the federal court, "unreasonable." On the contrary, federal courts have no power to re-evaluate the state court's application of its own rules. Rather, even under current law, defaulted claims may be reached only if either (1) the prisoner makes a strong case for innocence; (2) he can demonstrate that he was *prevented* from complying with the state rule by some external impediment; or (3) the application was so freakish or surprising that the prisoner never had a real chance to present his claim to the state courts.

In my experience, it is that third category of exceptions to state procedural defaults – the so-called exception for "inadequate" rules – that does the most mischief. It certainly sounds reasonable for the federal courts to overlook defaults that deprived a state defendant of his chance to have his claim heard, but too often this simply means that the federal court will reach the claim if the state rule was at all "unpredictable" or "inconsistent." This is an unworkable standard, of course, because almost all legal rules are at times "unpredictable" in the sense that a judge could reasonably go either way. The message for states is plain: In order for state procedural rules to be respected by federal courts, there should be *no possibility for discretion and no exceptions*. This result helps no one.

The second exception to state defaults – where the prisoner was prevented by some external impediment from complying with state rules – also produces much unnecessary litigation. Is a prisoner, for example, "prevented" from complying with state

rules if he is mentally ill? If so, who decides if he is mentally ill? What is the standard – how "mentally ill" must the defendant be? Must the state hire expensive psychological experts simply to *disprove* allegations of mental illness, and thus to enforce its own procedural rules?

I think it is tempting to conclude that all such procedural questions should be resolved in favor of the prisoner, and all claims should be heard on their merits in federal court. But there are serious consequences for such a forgiving, petitioner-friendly approach. The resources and attention of local prosecutors would be permanently shifted to the federal forum, which means less attention to catching and trying criminals in the first place. No conviction would ever be final. Prisoners would have every incentive to delay their claims or go straight to federal court, thus turning state appeal and collateral review procedures into a "tryout on the road" rather than the "main event." Witnesses and evidence at trial, long grown stale, are simply less convincing years later, and more guilty criminals will be set free.

It is important to remember that a prisoner who files a federal habeas petition does not start from square zero. He has already been tried and convicted by the state government, and he usually has had at least one appeal and at least one go-round of state collateral review. Without serious constitutional problems, the federal courts should not intervene. Ignoring state procedural defaults plays havoc with this scheme.

2. The "opt-in" provisions for states that impose the death penalty sets up a workable compromise. In return for guaranteeing that each capital defendant will receive a competent defense from experienced lawyers, the federal habeas courts will no longer intervene unless an innocent person is about to be executed.

As of now, the process in death penalty cases has become so long, so drawn out, that the system is absolutely broken. The best solution is to guarantee effective representation from the very beginning of the process – not re-opening of every case years later – and to retain a safety valve where to avoid terrible miscarriages of justice.

It is true that federal judges sometimes disagree with their state brethren about whether a particular error has occurred. As I read the bill, where there is disagreement, the state courts' judgment holds. But where the states have rejected a claim, and the state system has created a system where each capital defendant receives competent and experienced counsel, it makes sense to limit the federal courts' role to the guardian of the truly innocent – rather than simply engage in second-guessing of state court decisions.

3. When I became Chief of the Federal Litigation Unit at the very beginning of 2000, there were only two assistant district attorneys permanently assigned to the unit (which does exclusively federal habeas work). These two lawyers were Marilyn Murray, Esq., and Jeffrey Krulik, Esq. As of the date of my testimony, there were eight lawyers in the unit other than myself: Ms. Murray, Susan Affronti, Esq., David Glebe, Esq., John Goldsborough, Esq., Robert Falin, Esq., Helen Kane, Esq., Joshua Goldwert, Esq., and J. Hunter Bennett, Esq. All of these lawyers work exclusively on federal habeas matters. Finally, I also carry a full habeas caseload, in addition to my habeas supervisory duties.

While a unit of eight lawyers, plus a Chief, may not seem very big, especially in comparison with large federal prosecution offices, it represents a significant slice of local resources, especially in these times of city budget scarcity.

I am very proud of each of the lawyers in my unit, who work very hard for the public, and who do their best to ensure justice every day, at a fraction of what they would make in the private sector. As of today, each of these lawyers are still in the unit, with the exception of Mr. Bennett (who has gone to private practice), Mr. Falin (who went to a different state prosecutor's office just this week), and Ms. Kane (who has moved to the state appellate unit). We do not yet have a replacement for Mr. Falin, but the other two lawyers have been replaced by Anne Palmer, Esq., and Molly Selzer, Esq.

ANSWERS TO WRITTEN QUESTIONS FROM SENATOR DEWINE "Habeas Corpus Proceedings and Issues of Actual Innocence" Hearing of July 13, 2005

Tom Dolgenos, Chief of Federal Litigation
Philadelphia District Attorney's Office

I. Cases cited by Mr. Scheck.

The following cases were referenced by Barry Scheck as cases that would have come out differently – with people on death row who would have been executed – had the SPA been the governing law. As set out below, I do disagree with several of Mr. Scheck's assessments.

Ron Williamson. (See Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997)). I do not believe the SPA would have prevented the federal courts from granting relief in this case because of his failure to exhaust claims in state court. In fact, the district court granted relief to Mr. Williamson on a number of independent grounds, at least *six* of which had been exhausted in the Oklahoma courts on direct appeal. See Williamson v. Oklahoma, 812 P.2d 384 (Ok. Crim. App. 1991). These claims were: (1) the trial court improperly denied expert testing of semen and saliva evidence; (2) the trial court failed to give a manslaughter instruction; (3) the jury verdict in both the guilt and sentencing phases may not have been unanimous; (4) unreliable hair analysis was used at trial; (5) defense counsel was ineffective in failing to call a witness who would have testified to another person's confession to the crime; and (6) counsel was ineffective for not investigating Mr. Williamson's competence. The SPA's limitations on defaulted and unexhausted claims would not have impeded review of any of these claims.

Nicholas Yarris. (See Yarris v. Horn, 230 F. Supp.2d 577 (E.D. Pa. 2002)). Mr. Yarris' evidence of innocence is unrelated to the claims he made in federal court. The upshot of Mr. Scheck's argument is, thus, that the sheer length of federal proceedings is a good thing, because it allowed Yarris time to take advantage of improved DNA technology – earlier tests had been inconclusive. This is an argument against having a statute of limitations, or a bar against successive petitions, or a death penalty, all of which we already have without the SPA. It is not a convincing argument to allow stale or waived claims to move forward despite all procedural bars, simply for the sake of giving the prisoner more time.

For several reasons, Mr. Scheck's conclusions about this case are misleading. He insists that under the SPA, Yarris would have been executed before he was proved innocent. But with the improvements in DNA testing, the *first* DNA test would have ruled Yarris out as the rapist in the rape/murder of Linda Mae Craig, and prolonged habeas proceedings would have been totally unnecessary to enable discovery of these

facts. Furthermore, assuming that Pennsylvania qualified for the standards set out in Section 9 of the PCRA, Yarris would have been entitled to competent counsel and adequate funding for earlier investigation of these factual issues.

Finally, the Yarris case is a good example of how the present system, which encourages delay and late evidence-gathering, may actually hurt the search for truth. I was not involved in this case (which arose in a different Pennsylvania county), but there is real doubt whether Yarris is actually innocent of this murder – he may be innocent, but he may be guilty. It was he who originally approached the police, saying he had information about the crime, which he hoped to trade for lenient treatment in another case. This information – which blamed the murder on a different person – turned out to be bogus. Yarris soon confessed, and told police that he had committed the crime with another unidentified man; while this other man committed the murder, Yarris insisted, he himself had only raped Ms. Craig. The DNA evidence shows this confession to be false; but it is certainly possible that Yarris merely switched roles in his confession, in an attempt to avoid the murder charge, or otherwise lied to cover-up his involvement. That is, it might well be that *he* was the killer but his accomplice perpetrated the rape; or that he was involved in another way. Unfortunately, at this point the case has gone completely stale, evidence has proved impossible to find, and a new trial simply isn't possible. If the DNA had been conclusively tested at the time of trial, perhaps authorities would have been able to forge a more reliable result.

Eric Clemmons. (Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997)). I do not believe the SPA would change the outcome in this case. The Eighth Circuit granted habeas relief on two grounds: a Confrontation Clause claim, and a claim that Clemmons' counsel was ineffective for failing to call a different witness. (This second claim was also framed as a Brady claim, because Clemmons alleged that the prosecution had never provided him with the document reflecting information received from this witness during the course of the investigation. The Eighth Circuit did not find it necessary to resolve this dispute, however, because in its view Clemmons was entitled to relief under either the ineffectiveness theory, or the Brady theory.) With respect to the Confrontation Clause claim, as far as I can tell, there was no default – the claim was raised in a successive petition for state collateral review, which was denied without comment. Because the state did not invoke a procedural bar to this claim, it should be presumed to have been decided on the merits, and so this claim is exhausted. The SPA would not change that analysis.

As for the ineffectiveness/Brady claim, I believe that this claim would be barred even under the present habeas statute. Clemmons' habeas petition was filed before AEDPA was enacted, so its provisions did not apply to him. One of AEDPA's most important reforms is contained in section 2254(e)(2), which prohibits federal evidentiary hearings where the prisoner failed to develop the factual record in state court. Clemmons specifically declined to call the new witness at his post-conviction state evidentiary hearing – he waited until his federal habeas hearing to introduce this evidence. Section

2254(e)(2) now prohibits this kind of delay, and Clemmons would not have been able to prevail on this claim even under current law.

Finally, as with many of these cases, it is an overstatement to say Clemmons was "exonerated." The state was unable to meet the reasonable doubt standard at retrial, to the satisfaction of the jury; that does not prove Clemmons was innocent. The passage of time almost always makes convictions more difficult, as memories fade and evidentiary leads disappear. This increased unreliability is not the same as "exoneration."

Ernest Willis (see Willis v. Cockrell, 2004 U.S. Dist. LEXIS 15950 (W.D. Pa. 2004). The SPA would not have changed the result in this case. Mr. Scheck insists that Section 9 of the SPA, which limits review in capital cases to claims involving new evidence of actual innocence, would have prevented review here. But this puts the cart before the horse. Section 9 does not apply to older cases (like this one), but would only apply if the state first *qualifies* by guaranteeing experienced counsel in death penalty cases, and sets up a system whereby these counsel are paid a reasonable fee, and have at their disposal a reasonable source of funds for litigation expenses. In Willis' case, his counsel was not experienced and not adequate, and he made no real effort to win this case. As the district court explained,

> ... Willis's case was his counsel's first capital trial. The defense did not prepare for the penalty phase, did not meet with Willis in advance of the penalty phase, introduced no evidence, and presented no witnesses whatsoever on Willis's behalf.

2004 U.S. Dist. LEXIS 15950 *20. The SPA aims to stop errors like this before they happen.

Mr. Scheck also claims, in the alternative, that Willis' claim of forced medication would have been thrown out of federal court under the SPA because Willis' counsel did not make an objection on these grounds at trial. But this makes little sense, because Willis raised an *ineffectiveness* claim based on counsel's failure to object, and this claim was fully exhausted in state court; the district court granted Willis a new trial based on this failure of defense counsel, and this result would not have changed under the SPA.

Mr. Scheck's final complaint about this case centers on Willis' claim that the prosecution suppressed evidence that would have been relevant to the jury's sentencing determination. According to Mr. Scheck, the Texas Court of Criminal Appeals denied this claim because the prosecutor's evidence was not prejudicial, and section 6 of the SPA prohibits federal courts from re-visiting questions of "harmless error in sentencing". But "materiality" – that is, prejudice – is *part* of the analysis for Brady violations; it is not a separate "harmless error" test at all. See Strickler v. Greene, 527 U.S. 263, 280-81 (1999). Thus, when the Texas court found that the Brady violation in Willis's case was not material, that was part of the court's substantive holding, and section 6 of the SPA would not change the ultimate federal result.

Ricardo Aldape Guerra (see Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996)). First, it is misleading to call Mr. Guerra "innocent" without further explanation. In fact, while there is doubt as to whether Mr. Guerra was the triggerman in a police shooting (the crime for which he was convicted), the evidence shows he was at least an accomplice. He was undoubtedly present at the scene, and in the company of the triggerman; he carried a gun, he fled with the shooter, and police found him hiding at the site of a subsequent shootout. Near him was a gun wrapped in a bandana.

I do not believe the SPA would have altered the result. For one thing, I am unsure about whether any of Mr. Guerra's federal claims were even exhausted in state court. The federal court opinions in this case do not describe the state proceedings with any particularity; I suspect that some or all of these claims were defaulted. It may be that the state waived the exhaustion requirement, which it could still do under the SPA, section 4. On the other hand, if the claims were actually raised and decided in state courts, then the federal court would have to defer to the state court's decision, except if that decision was unreasonable. But that is true even now, under AEDPA (Mr. Guerra's petition was filed before the enactment of AEDPA in 1996); the SPA does not change that standard of review.

Finally, Mr. Scheck once again argues that Section 9 of the SPA, which limits review of capital cases, would have prevented relief in this case. But once again, Section 9 is not retroactive; it applies only to cases arising out of states that comply with counsel and funding requirements *in the future*. Thus, the SPA would have had the same impact on this case as the special death-penalty provisions of the AEDPA – that is to say, none. And while Mr. Scheck claims that the evidence of prosecutor misconduct relied upon by the federal district court was not "newly discovered" and therefore Section 9 would have prevented review if the SPA were somehow to retroactively apply here, I am unable to verify that assertion. The state court opinion does not discuss these issues, see Guerra v. State, 771 S.W.2d 453 (Tex. Ct. Crim. App. 1988), and so it seems probable that this evidence was new when brought to federal court. (In fact, the state court decision does not address claims of prosecutor misconduct at all – and the lone dissenter goes out of his way to state, while recommending that the conviction be reversed on an evidentiary question, that he "mean[s] to impute no bad faith on the part of the prosecution nor malice in the trial court", 771 S.W.2d at 486 (Clinton, J., dissenting)). If the evidence was new, then Mr. Scheck's characterization of Section 9's impact in this case is incorrect.

Curtis Kyles (see Kyles v. Whitley, 514 U.S. 419 (1995)). It is misleading to declare Kyles "actually innocent" when there is substantial disagreement about this case. Five juries were unable to agree on a verdict, and the Supreme Court itself was sharply divided, 5-4, as to whether the prosecution's failure to disclose certain evidence was

sufficiently material to disturb the conviction. In any event, Section 9 of the SPA, which Mr. Scheck insists would have prevented the federal courts from granting relief, would not have applied retroactively to this case; it applies to future cases, where the state has met certain counsel and funding requirements. Finally, it is worth noting that Mr. Kyles filed his petition before AEDPA was enacted in 1996, and thus his federal claims were reviewed *de novo* without any deference to the earlier state court opinions which rejected the very same claims. The result might well have been different under AEDPA, but there is no additional difference-making change under the SPA.

Federica Martinez-Macias (see Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992)). In this case, the 5th Circuit famously declared, "The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for." The point of Section 9 of the SPA is to change the system that underpaid the defense lawyers and helped to create error at trial. The law encourages states to pay counsel a reasonable fee, and provide them with reasonable investigative funds, and limit capital case appointments to counsel with experience; that way, this sort of error won't happen. But section 9 will not apply retroactively, only prospectively where the requirements have been met, and thus it would not have applied in this case and would not have changed the outcome.

II. Cases Cited by Mr. Waxman.

Senator DeWine also asked that I address the four cases cited by Mr. Waxman in his testimony before this Committee, as instances where the Streamlined Procedures Act would have changed the result. In all four of these cases, the state defendant won relief in the United States Supreme Court. Obviously, I was not involved in any of these cases, but as explained below I generally disagree with Mr. Waxman's analysis.

1. Miller-El v. Dretke, 545 U.S. 231 (2005). Mr. Miller-El was tried and convicted of murder in a Texas court in 1985. While his appeal was pending, the United States Supreme Court decided Batson v. Kentucky, which for the first time allowed litigants to challenge the discriminatory use of peremptory challenges in the selection of a single jury. Twenty years later, in 2005, by a vote of 5-3, the Supreme Court held the state's rejection of Miller-El's Batson claim to be unreasonable. As a consequence, the Court granted Mr. Miller-El a new trial, and overruled the decisions of the state courts, and the lower federal courts, which had affirmed the conviction.

Mr. Waxman contends that the SPA, if enacted, would have changed this result, but that is misleading. First, Section 9 of the SPA, which sets new standards for capital cases in states that have met certain threshold counsel and funding requirements, and which Mr. Waxman states would have prevented the Supreme Court from granting relief in Miller-El, is not retroactive. The point of Section 9 is to assure that defense counsel in capital cases are adequately experienced, trained and funded *in the future* – this case

would not be subject to the SPA, if enacted, even if Texas eventually met the requirements. Presumably, competent counsel would raise and pursue a Batson claim if the same jury selection were to happen today. And because the law today is very different – after all, Batson has now been the law for more than 20 years – this jury selection would presumably proceed differently, and the "policy" of discrimination by local prosecutors would today be absolutely, unequivocally illegal.

More fundamentally, Mr. Miller-El apparently has no plausible claim of innocence. Without such a claim, and because his Batson claim was rejected by the state courts (and by the lower federal courts as well), the split decision of the Supreme Court would not be enough to overturn the conviction under the SPA, as I interpret it. But that is exactly the policy choice the SPA seeks to make – where there is a valid claim of innocence, habeas is an available, wide-ranging remedy; where the defendant is guilty, habeas is limited in its availability. Given the problems of delay and never-ending criminal litigation, that is an advisable choice.

2. Banks v. Dretke, 540 U.S. 668 (2003). I disagree with Mr. Waxman's claim that this case would come out differently under the SPA. The Banks case involved several plain instances of prosecutor misconduct – that is, failure to provide significant and possibly exculpatory evidence to the defense. Moreover, the prosecution actually allowed the defense to believe that this evidence did not exist, by not correcting false testimony and representations by its witnesses.

Mr. Waxman says that three provisions of the SPA would have prevented relief in Banks. First, he says that Section 2, which sets out a clear exhaustion requirement, would have prevented relief because the claims were not fully presented in state court. First of all, the Supreme Court held that the legal basis of his claim *was* exhausted. 540 U.S. at 690 & n.11. As for the unexhausted factual allegations: the SPA changes the old standard (unexhausted claims not reviewable unless claimant shows cause and prejudice for his failure to exhaust) and would allow review only for unexhausted claims based on new evidence, or where the defendant has a convincing case for actual innocence. But in Banks, the evidence was "new" because the prosecution had failed to disclose it, and it was not previously discoverable because the prosecution has misled the defendant about its existence. As I read the SPA, section 2 would not have been a bar. Mr. Waxman notes that Banks received some discovery only in federal court when he came forward with new allegations; but presumably if the exhaustion requirement was strictly enforced (as the SPA would require) he would have made these allegations in state court first, so that exhaustion would not have been a problem. It is not a *bad* thing that the SPA requires exhaustion with few exceptions; it is meant to change litigation and channel claims into the state courts.

Mr. Waxman also argues that Section 3 of the SPA sets up an "independent" bar, but as I read the bill, Section 3 – which prohibits amendment of habeas petitions to add new claims unless they rely on new evidence that goes to innocence – simply conforms

the amendment rules to the requirements of Section 2. As I explained above, I don't believe that Section 2 would have barred Mr. Banks' claims.

Finally, Mr. Waxman insists that Section 9 of the SPA would also have barred Banks' claims. Again, Section 9 is not retroactive, so passage of the SPA would only effect future cases. Assuming that the state meets the funding and counsel requirements, Section 9 would limit review to cases where the defendant has a convincing argument for innocence. Further assuming that this case would nevertheless arise in the future once those requirements had been made, it seems clear to me that the defendant would argue that he *does* have a convincing case for innocence. I don't know what the federal courts would decide on that issue, given the facts of the Banks case, but certainly the issue would be on the table.

Finally, Banks was a pre-AEDPA case, so even under current rule of deference the standard of review would be different (and more strict). That does not mean necessarily that Banks would presently come out differently, but it is certainly a possibility.

The most one can say about the SPA's effect on a case like Banks is that the defendant would have been under more pressure to present his full case, and full requests for discovery backed up with all the evidence he could muster, to the state courts in the first instance. It is meant to *change litigation behavior*, and prevent litigation of new issues in federal court. For capital cases, the defendant must be able to make a convincing argument that he is innocent. But that is exactly what the SPA is designed to accomplish; it is not a "problem" with the law.

3. Wiggins v. Smith, 539 U.S. 510 (2003). The defense lawyers who represented the defendant in Wiggins were constitutionally ineffective because they failed to perform rudimentary investigation about their client's background to present at the death penalty hearing. While Mr. Waxman complains that the SPA would have barred relief, the point of Section 9 (relating to capital cases) is to prevent such problems *before they happen* by requiring adequate funding and experienced lawyers who presumably won't make such errors. Section 9 would not effect old cases like Wiggins; it would only apply in the future, in states where the prerequisites of Section 9 have been met. It is an improvement in the system to prevent this type of error from occurring in the first place.

4. Lee v. Kemna, 534 U.S. 362 (2002). Unlike Mr. Waxman, I believe the federal courts current rule of "adequacy" allows far too much second-guessing of state court convictions in federal court. That is, if a state court declines to review the merits of a claim because of a plain state rule, many federal courts will grant wide-ranging, *de novo* review to the claim merely if the defendant shows that the state rule has been applied "inconsistently". As the committee knows, "inconsistency" is subject to varying interpretations, and frankly some level of inconsistency is inevitable. The current

"adequacy" rule needs fixing. Where a defendant has fair notice of a state rule and fails to comply with it, he should not be able to gain federal review simply because a different state court judge might have applied the rule differently.

The SPA, Section 4, would limit review of defaulted claims to cases where the defendant can make a strong showing of innocence. The Supreme Court in Lee specifically declined to reach whether Lee met this standard; if he could, then the SPA would not prevent review in federal court. This is again in line with the SPA's goal of creating more review in cases where a strong showing of innocence has been made. On the other hand, if a defense lawyer fails to satisfy a plain state rule at trial or direct appeal, a claim of "ineffectiveness" is still available in habeas (so long as that ineffectiveness claim is also exhausted in state court, presumably on state collateral review). The Court in Lee also declined to address whether Lee's counsel was ineffective for failing to comply with the state rule (or investigate possible alibi defenses earlier in the process). If the SPA were to pass, Lee would have had every incentive to litigate an ineffectiveness claim in state court, and *then* come to federal court.

I think that is a fair compromise: the current test for "inadequate" state rules would be tightened under the SPA, but those defendants who can make a strong case for innocence, or who encountered a default because of an incompetent lawyer, can still get federal review.

Questions from Chairman Specter
Posed to Barry C. Scheck
"Habeas Corpus Proceedings and Issues of Actual Innocence" (S.1088)

Question 1. *In your written statement you acknowledge that Senator Kyl's bill attempts to provide an "escape hatch" for "actual innocence" claims, but argue that it would still be too difficult.*

In the Tennessee death penalty case, House v. Bell, which is pending before the Supreme Court, the issue is whether the Petitioner's newly presented evidence, which made a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts. What would need to be done to S. 1088 to rectify the apparent injustice of House and enable a petitioner, who has otherwise been barred from raising his claim, to obtain habeas relief in circumstances in which DNA evidence tending to exonerate thee defendant was either a) unavailable at the time of trial, or b) available but not submitted for testing?

Answer to Question 1:

I'm grateful that Chairman Specter has asked me to address House v. Bell, which the U.S. Supreme Court will hear this term. As indicated in the Chairman's question, House is an extremely troubling case on its facts, in which DNA testing *and* a veritable mountain of other evidence (including non-DNA science and two highly credible confessions by the likely true perpetrator) indicate that the petitioner is wholly innocent of the murder for which he has spent almost two decades on death row. Yet the narrowest possible majority of the 6th Circuit Court of Appeals determined that he was entitled to no relief whatsoever. More fundamentally, however, for a number of reasons House illustrates precisely why S.1088 goes entirely in the wrong direction where the innocent are concerned – that is, why it would foreclose, rather than increase, the opportunity to prove one's innocence in federal court through both DNA testing *and* other forms of highly persuasive scientific evidence. Indeed, the fact that the Supreme Court is poised to review and correct the grievous error in House this Term and clarify the standard to apply to all such innocence cases is ample reason why, at the very least, this Congress should defer a vote on these proposed radical changes to habeas corpus law until after the Court rules.

For those Senators not as familiar with the facts and history of the House case, let me begin with a brief overview to put my response into context. Mr. House was convicted and sentenced to death for the murder of his neighbor, Carolyn Muncey, in 1986. Among the critical evidence that sent him to death row were the results of primitive serological analysis on two semen stains found on the victim's clothing that appeared to match Mr. House's blood group characteristics, ones shared by fewer than 10% of the male population, and excluded the victim's husband; that evidence was critical to place Mr. House at the scene of the crime and to establish the State's claimed motive (attempted sexual assault) for the entire case against him. At trial and in his state post-conviction proceedings, Mr. House was afforded only poorly-trained, under-resourced appointed counsel who did no meaningful investigation into his substantial claims of

innocence; indeed, his state post-conviction counsel summarily waived virtually every innocence claim (over his own client's objection) before conducting any investigation at all. Fortunately, Mr. House was appointed able counsel on his federal habeas proceedings, who conducted an extremely thorough investigation and has offered enormously compelling showing of actual innocence – including, but by no means limited to, DNA test results not available at trial and never presented to the jury. This evidence includes, among other things, DNA testing proving beyond any doubt that Mr. House was *not* the source of the semen stains on the victim's clothing that had been falsely attributed to him at trial; scientific evidence from the State of Tennessee's own Assistant Chief Medical Examiner, regarding the enzyme composition of blood from the victim found on Mr. House's jeans, which in his expert opinion proves that the blood at issue was spilled from the autopsy tubes during shipment of these items between laboratories in 1986, but did *not* come from the victim's own veins during the crime (further buttressed by proof that a substantial amount of blood in the tubes prior to shipment was missing upon arrival); and a wealth of lay evidence inculpating the likely true perpetrator – the victim's abusive husband – including the husband's attempts to fabricate an alibi for himself, and his highly credible, contemporaneous confessions to the murder to two members of the community, who have absolutely no motivation to falsely implicate him or defend Mr. House.

Because his prior counsel had failed to develop any of these claims in state court, however, Mr. House's only opportunity for relief is through the "gateway" for actual innocence established by the Supreme Court in *Schlup v. Delo*, 513 U.S. 298 (1995). *Schlup* allows a federal court to consider otherwise procedurally barred claims (here, violations of *Brady* and the right to effective assistance of counsel) if the new evidence of innocence is so strong that "no reasonable juror" would likely have convicted him. Yet in a truly grudging application of *Schlup*, the en banc Circuit majority held that while House had established a "colorable claim of actual innocence," the DNA and other evidence did not suffice, and thus foreclosed any relief.

Fortunately, the U.S. Supreme Court announced this spring that it would hear the case this term; it will be the first "actual innocence" case the Court has addressed in over a decade, and the first ever to involve DNA test results. Many Court observers are hopeful that the Court will not only correct the clear error below (*i.e.*, make clear that such strong evidence of innocence does satisfy *Schlup*), but will also make unequivocally clear that "freestanding" actual innocence claims are cognizable on federal habeas (*i.e.*, those which do not depend on a claim of constitutional error at trial, but in which relief can be granted based on truly powerful evidence of innocence, albeit under a highly demanding standard). The Innocence Project filed a brief as *amicus* in support of certiorari, and will do so again on the merits this term, in which we not only urge the Court to reverse the decision below, but to specifically address, for the first time, the great weight that DNA and other forms of equally probative scientific evidence of innocence (fingerprints, ballistics, etc.) should carry in the constitutional balance.

Given the historic opportunity posed by House, in my view it would be a grave mistake for the Committee to preempt the Court's ruling and rush to pass S.1088 this fall, even in its current, amended form. It is clear that wholesale changes throughout the bill would be necessary -- not only to correct the injustice in House and similar cases, but to ensure that future petitioners

in his shoes have *any opportunity at all* to prove their innocence in court. This is so for several reasons.

(1) S.1088 would effectively eliminate the *Schlup* actual innocence "gateway." Even with the former Sec. 9 from Sen. Kyl's bill deleted from the current version as introduced by Chairman Specter, the so-called "exception" to the law's procedural bars for claims of actual innocence would be impossible for virtually all habeas petitioners – including Paul House – to satisfy. This is because Sections 3, 4, 8, and 13 of the bill strip the federal courts of jurisdiction to consider any constitutional claim or freestanding claim of actual innocence that was not fully presented and adjudicated in state court, *unless* the petitioner can satisfy the extraordinarily demanding test of 28 U.S.C. §2254(e)(2). That would require the petitioner to establish both (1) that "by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty," *and also* that (2) the evidence could not have been presented earlier (in state court) if the petitioner's counsel had exercised "due diligence."

As noted earlier, in House, the inadequate and overburdened state post-conviction counsel did not have the resources to investigate or present these powerful claims of innocence in state court, although of course it would have been theoretically possible to do so had counsel truly exercised "due diligence" in seeking DNA testing, interviewing key witnesses, etc. And that is the case, sadly, for many innocent persons in our nation's prisons and death rows. But it seems quite unreasonable to declare that *even undisputed DNA or other scientific evidence of innocence* cannot now be presented to save a petitioner's life and apprehend the true perpetrator merely because state post-conviction counsel failed to uncover it. That is precisely why the Supreme Court – balancing the interests of "finality" with actual innocence – crafted the narrow *Schlup* gateway at all, and why it remains a critical safeguard for petitioners like Paul House who have compelling evidence that they are in fact innocent of the crimes for which they are to be executed. Perversely, however, even while petitioners like Paul House are being wrongfully denied relief under a misinterpretation of existing law, S.1088 would *replace that standard* with another one ("clear and convincing evidence") that all agree is *far more difficult to satisfy than current law, not less.*

I remain cautiously optimistic that given the Supreme Court's decision to make room for House on its scarce docket, it is poised to correct the decision below and clarify the appropriate standard that should apply to DNA and other persuasive evidence of actual innocence. By effectively replacing the *Schlup* standard with the enormously burdensome test of §2254(e)(2), however, S.1088 would render *Schlup* irrelevant; as such, it could well lead the Supreme Court to dismiss the writ as improvidently granted, since *no* avenue of relief would be available to Mr. House under federal habeas as so rewritten.

(2) The "DNA testing" (Sec. 8 and 13) provisions of S.1088 are inadequate; they will be virtually impossible to satisfy in practice, and make no provision for other, equally probative scientific evidence of innocence.

Unfortunately, neither Paul House nor any other similarly situated habeas petitioner will be able to use the "DNA testing" provisions in Sec. 8(c) and Sec. 13 of the bill. There are a number of defects in these provisions which will ensure that virtually no one will be able to apply them to secure scientific testing to prove their innocence or get relief based on actual innocence. Among others, they include:

- **No provision for any objective scientific testing, other than DNA, which can prove innocence and identify the true perpetrators of crime beyond any doubt.** Government estimates have put the number of serious felony cases that potentially involve DNA evidence from the perpetrator at only 15-20% of all such crimes. But fortunately, there are other areas of forensic science -- ballistics, fingerprints, and more -- in which modern technological advancements now make it possible to prove innocence and catch the real perpetrators of crime in ways unheard of at a trial 10 or 20 years ago. There is every reason to extend Sen. Specter's amendments pertaining to DNA testing to include a vehicle for testing in these other areas, so that innocent defendants can use modern science to prove their innocence and the real perpetrators can also be caught. Notably, the usual "finality" objections do not apply to such types of evidence, since -- as with DNA, but unlike lay witness testimony -- these forms of advanced science are *more* reliable and accurate than what was available to the jury at trial.

  Let me just give you a few examples. With fingerprints, modern digital enhancement technology now means that we can enhance blurry or partial prints from crime scenes that were previously deemed unreadable, and for the first time compare those prints to known alternate suspects and -- even more importantly -- run them through the national AFIS (Automated Fingerprint Identification System) databank, containing prints from millions of convicted offenders and unsolved crimes. This technology has every bit as much potential to conclusively exonerate an innocent person as DNA does (and perhaps more, since prints are present far more often than DNA). And it is revealing troubling errors in past practices that desperately need more thorough and systematic review. In the case of Innocence Project client Stephan Cowans, for example, the DNA evidence that exonerated him of an attempted murder conviction also revealed that *two separate analysts* from the Boston Police Department had erroneously identified a crime scene fingerprint as his. Similarly, in the wake of the highly publicized error made by the FBI in falsely implicating Oregon attorney Brandon Mayfield in the Madrid bombing, that agency is commendably undertaking a full reexamination of its practices and procedures in fingerprint analysis. Unlike DNA testing, however, only four states currently have laws allowing defendants to make post-conviction motions to inspect crime scene prints or run them through AFIS – and the habeas bill does nothing to fill this huge gap.

  Similarly, important new research has recently been done in the area of ballistics permitting much more precise and reliable determinations to link (or exclude) a

particular firearm and a crime. Even more significantly, however, for post-conviction purposes, some of the advanced work done in the area of ballistics has proven that previous methods used by state and federal experts were "junk science" and led to wrongful convictions. The most recent of these discoveries concerns "CBLA" (composite led bullet analysis). This was a method of 'matching' or excluding crime scene bullets as coming from a box of bullets owned by a defendant, or produced during a set period by a certain manufacturer, that the FBI exclusively used for over 40 years. The FBI itself requested the National Research Council (NRC) of the National Academy of Sciences to study the technique, which was under attack, and the NRC concluded that testimony by FBI experts in thousands of cases concerning CBLA matches and exclusions was *unreliable and should be deemed without merit in old cases.* The first case overturning a conviction on that basis was just handed down by an appellate court in March (*Behn v. New Jersey,* 868 A.2d 329 -- including citations to the NAS study), and we expect others will follow. As Bryan Stevenson eloquently explained at the last hearing on S.1088, though, very few indigent defendants have the resources or the procedural vehicles available to get access to the kind of advanced ballistics evidence, even evidence that was critical to the jury's original finding of guilt but which may have been wholly false.

Surely, it would be a travesty if an innocent person were confined to life in prison or executed when scientific evidence in the state's custody that could prove their innocence beyond any doubt is not made available to them for testing. At a bare minimum, then, these "DNA testing" provisions should be amended to include access to "other scientific testing or analysis" as well.

- **"Clear and convincing evidence" and "due diligence" standards are far too demanding.** As with claims of actual innocence generally, under Sec. 8 and Sec. 13, all habeas petitioners seeking DNA testing will have to first satisfy the extraordinarily burdensome test of §2254(e)(2). In the DNA testing context, this requirement is even more illogical, since that would mean a petitioner would need to have exercised "due diligence" and have "clear and convincing evidence of innocence" fully developed in state court *before they can even seek a DNA test to prove their innocence.* Given the undisputed probative value of DNA science, it seems quite unreasonable to punish these potentially innocent individuals for their prior attorneys' lack of diligence when a simple DNA test could resolve the issue.

- **The "reasonable possibility" standard illogically requires federal courts to *guess the DNA test results* in advance of any actual testing.** Sec. 13(3)(C) only allows DNA testing to be ordered if the court first determines that there is a "reasonable possibility that the DNA testing will produce exculpatory evidence" of innocence. Unlike, say, the Justice For All Act, which (like most state DNA laws), requires the court only to determine whether such testing *has the scientific potential* to prove innocence (by weighing the impact of any exculpatory results

against the other evidence in the case), this "reasonable possibility" test requires the court to guess what the results will be, and only allow testing for those who appear *likely* to be proven innocent. We know from experience, however, that we are often wrong about such assumptions. Far too many individuals whom DNA has proved to be factually innocent once appeared truly guilty; Kirk Bloodsworth of Maryland, for example, was mistakenly identified by five separate eyewitnesses as the perpetrator of the murder for which he was wrongfully sent to death row, before DNA testing proved his innocence and led to the apprehension of the real killer. Just as no court would likely have believed, prior to testing, that there was a "reasonable possibility" that these witnesses (and the jurors) were all wrong, future petitioners like Mr. Bloodsworth who *appear* to be guilty through less reliable forms of evidence will no doubt be denied the very DNA testing which can prove otherwise under the S.1088 standard.

In sum, there are a number of substantive improvements to federal habeas procedure that can be made to give petitioners like Paul House access to DNA and other forms of scientific evidence that can prove innocence, and to ensure that courts meaningfully review claims of innocence based on this evidence. But they are not to be found in S.1088. And indeed, because the bill would strip petitioners like Mr. House of the one meaningful avenue of relief still available to him under current law – one that the U.S. Supreme Court, I believe, is poised to clarify and strengthen in the coming months -- speedy passage of the bill would, ironically, defeat the worthy goal of protecting the innocent that Chairman Specter and other members of the Committee have so ably championed in the past.

Question 2: *Proponents of habeas reform have rightfully considered the impact of delays in deciding habeas petitions on the victims of the underlying crimes. Mary Hughes, the mother of Christopher Hughes who was murdered, along with his best friend's family, in 1983 was scheduled to testify in today's hearing but was unable. Their experience with habeas delays should not be lost in this discussion.*

In this case, convict Kevin Cooper was convicted of the multiple, brutal murders. The evidence of the defendant's guilt was overwhelming. He had stayed at the vacant house next door at the time of the murders, the hatchet used in the murders was taken from the vacant house, shoe prints in the Ryen house matched those in the vacant house, and the defendant's blood type and hair matched that found in the Ryen house. The Defendant was convicted of the murders and sentenced to death in 1985, and the California Supreme Court upheld the defendant's conviction and sentenced in 1991.

Despite overwhelming evidence of his guilt, the courts allowed more testing. The defendants asked for DNA testing of a blood spot in the Ryen house, a t-shirt near the crime scene, and the tobacco found in the car. These test inculpated the defendant, finding that the blood and saliva matched the defendant and the blood on the t-shirt matched both the defendant and one of the victims. In February 2004, the defendant filed a second habeas petition to pursue theories that

police had planted this DNA evidence. This case is still being disputed today, 22 years after the murder.

What changes should be made to avoid this length of delay and abuse of the habeas process which many would argue continues to victimize the victims of often horrible crimes?

Answer to Question 2:

We all appreciate that in some cases habeas corpus litigation has taken far more time to complete than should have been required. But I respectfully disagree with the suggestion made by some proponents of S.1088 that all such delays are the fault of death row prisoners seeking to "abuse" the process, or that S.1088 is the appropriate remedy for any such abuses. I have some limited familiarity with the Kevin Cooper case because I agreed to provide his attorneys with technical assistance on his initial requests, as well as formal motions, for DNA testing in the 1990s; the State vigorously opposed these DNA testing requests for several years, on the ground that no state or federal law provided for a right of access to such testing at the time. Had the State simply consented to the DNA testing when first sought, any questions regarding the source of the DNA evidence at issue, and the inquiry into whether a chemical analysis of the evidence reveals any concrete proof of tampering, could have been resolved long ago.

On that note, unfortunately, my organization's work in the DNA context has revealed that while there are many fine prosecutors who are committed to seeking the truth about decades-old convictions and will readily consent to DNA testing, others seek to avoid the "embarrassment" of a wrongful conviction by any means necessary -- often by tying up a prisoner's request for DNA testing in a series of procedural objections for years. Just a few weeks ago, for example, prosecutors in New Jersey finally agreed to join our motion to vacate the rape and murder conviction of Innocence Project client Larry Peterson based on new DNA test results that proved his innocence -- after fighting Mr. Peterson's motions to secure that DNA testing throughout *ten years* of litigation in both state and federal courts, during which time the other evidence against him was repeatedly characterized as "overwhelming." As Chairman Specter's hometown newspaper editorialized in the wake of the Peterson case, we all have a duty to try and shorten the deprivations of liberty that are the result of such unreasonable delays.[1] And in Chairman Specter's home state, on August 1, 2005, Innocence Project Thomas Doswell of Pittsburgh was exonerated and freed from prison based on DNA test results that proved his innocence of rape, after 19 years behind bars for that wrongful conviction. Tragically, Mr. Doswell could have secured the testing that proved his innocence and won his freedom seven years earlier -- had his first, *pro se* motion for DNA testing in state court not been summarily dismissed because he filed it a mere three weeks late. (While Mr. Doswell, fortunately, did not need to avail himself of federal habeas corpus to secure DNA testing in 2004, thanks to a newly enacted Pennsylvania state DNA testing law and our office's legal representation, had he been in one of the 17 states in

[1] *See* "The Larry Peterson Story: A Case of Justice Denied" (editorial), Philadelphia Inquirer, June 10, 2005; "The Larry Peterson Case: A Call for Compassion – And Justice" (editorial), Philadelphia Inquirer, July 28, 2005.

the nation with no such law, he would almost surely have been precluded from obtaining a DNA test under S.1088 on federal habeas in light of his state-court default).

The underlying issue of delay in post-conviction proceedings is, of course, a serious one that both the wrongfully convicted *and* the family members of crime victims have a common interest in resolving. Like Larry Peterson, many of the Innocence Project's exonerated clients lost irreplaceable, precious years behind bars – during which time their loved ones passed away, and their children grew up without a father or mother -- that they might have spent as free men were the system better equipped to efficiently review and resolve requests for DNA testing and innocence generally. But S.1088 does not, in my view, reasonably or appropriately address the issue of delays in habeas procedure, for two key reasons.

First, *the existence of and remedies for undue delay in federal habeas corpus proceedings have not yet been documented or studied in any systematic way.* They are based, instead, on anecdotal reports of delay in a handful of death penalty cases out of thousands currently pending in the system. I heartily concur with the recommendations of other witnesses before the Committee that at a minimum, a thorough study of national data and individual cases – based on a large and scientific sampling of cases from around the nation -- be undertaken before such a sweeping legislative "remedy" is enacted. Upon further study, I imagine we will find a number of measures to reduce delay in post-conviction proceedings that will both serve the innocent and promote efficiency – for example, requiring automatic discovery of the prosecution's entire file at the start of federal habeas, so that any *Brady* issues or new evidence of innocence are uncovered at the beginning of the process, and the courts can turn directly to the merits.

I also hope the Committee will take note of the extraordinary Resolution 16, adopted on August 3rd by the national Conference of Chief Justices and Conference of State Court Administrators, strongly opposing passage of S.1088 until meaningful post-AEDPA study is conducted. Surely, these state court representatives have as great an interest as anyone in ensuring the efficient administration of justice, and in making sure that federal courts do not unduly intrude on state court judgments in capital cases. Remarkably, however, *the Chief Justices from every single state in the nation but Texas* unanimously endorsed this Resolution. Their opposition has, with good reason, been echoed by overwhelming opposition to the bill from newspaper editorial boards throughout the nation in recent weeks.[2]

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[2] *See, e.g.,* "Rush to Execution Leaves Justice in the Dust" (editorial), San Jose Mercury-News, Aug. 19, 2005; "Hands Off Habeas" (editorial), Washington Post, Aug. 19, 2005; "Streamline or Steamroll?" (editorial), The Los Angeles Times, July 13, 2005; "Don't Rush to Judgment" (editorial), Knight-Ridder News Wire, July 23, 2005; "Death Tales" (editorial), Keene (NH) Sentinel, July 23, 2005, "Limits on Appeals" (editorial), The Detroit Free Press, July 19, 2005, "Trial and Error" (editorial), The Kansas City Star, July 15, 2005; "Dead Man Talking" (editorial), St. Louis Post-Dispatch, July 13, 2005; "The Star's View: At a Time When the American Public is Growing More Queasy About the Death Penalty, Senator Kyl Wants to Limit the Appeals Process" (editorial), Arizona Daily Star, July 9, 2005.

Second, *such sweeping and radical changes in the law will be subject to major constitutional challenges and interpretive rulings in the coming years, which will only increase delay in the resolution of individual cases.* Given that it took the federal courts nearly a decade to resolve a host of thorny questions related to AEDPA's provisions (including its retroactivity, scope, degree of deference to state court determinations, the intersection of "new rules" with the "old," etc.), a state of affairs that is just now being resolved, it seems counterintuitive to wholly rewrite the law and start the entire, laborious process over again with a new statute, absent some truly compelling showing of need. It is also likely that if enacted, the radical jurisdiction-stripping provisions of S.1088 will be directly challenged as an unconstitutional suspension of the Great Writ. Since the bill is expressly made to apply to all cases pending on the date of its enactment, it is not farfetched to assume that it could lead to a vast number of stays of execution and grind the system to a halt entirely, until that serious challenge is resolved by the Circuits or the Supreme Court itself. Surely that result would not serve those who favor a more efficient resolution of pending capital cases – but it will harm the innocent in the process.

Question 3: *You have mentioned that there have been 159 post-conviction DNA exonerations, and an additional 196 non-DNA related exonerations of convicted defendants between 1989 and 2003. How does this information compare to the data presented in the Death Penalty Information Center's "Innocence List," that of the 119 allegedly innocent defendants, from 1973 to the present, only six cases were resolved on federal habeas? Have you been able to identify more than the six cases resolved through habeas?*

Answer to Question 3:

These "lists" of innocence cases involve overlapping categories, but come from three separate sources. The first one concerns the total number of post-conviction DNA exonerations in the United States to date (which stood at 159 when I testified before the committee, and increased to 161 in the ensuing three weeks). This list is one that the Innocence Project maintains and posts on our website; it includes *both* capital and non-capital exonerations, provided that the conviction was vacated in whole or in part based on new DNA evidence. The 196 non-DNA related exonerations from 1989-2003 is a subset of data compiled in a recent study by Prof. Samuel Gross of the University of Michigan which looked at all known exonerations during that time period.[3] Finally, the "innocence list" maintained by the Death Penalty Information Center also includes both DNA and non-DNA post-conviction exonerations, but only of persons who had been sentenced to death. As of this writing, that list includes 121 individuals from around the nation exonerated since 1973.

The Innocence Project counts only those cases in which a conviction was vacated based upon post-conviction DNA testing of material evidence *and* the underlying indictment was then dismissed, either because of (a) a prosecutor's decision to dismiss the case rather than pursue retrial; (b) an executive pardon or grant of clemency; or (c) an acquittal by a jury at retrial. (This

[3] *See* Gross et. al., Exonerations in the United States: 1989 Through 2003, 95 J. Crim. L. & Criminology 523 (2004), available at www.law.umich.edu.

means that we do not count those individuals whose convictions were vacated but who accepted a plea bargain to secure their freedom rather than face retrial, no matter how powerful we might believe their claim of innocence to be; we also do not count, for example, those who were granted early release by a parole board convinced of their actual innocence.) Full descriptions of each exoneration that meets our criteria are available on our website at www.innocenceproject.org. Any Senator with questions about any of these cases is welcome to read the full "case profile" or contact my office directly for more information. I am sure that DPIC and Professor Gross would be willing to respond to similar inquiries and/or explain the criteria they used in compiling their own lists.

Thus, while some might characterize these individuals as "allegedly innocent," they meet the full "innocent until proven guilty" criteria that have been the foundation of our legal system for centuries. It should also be noted that many individuals whom some contended were "not really innocent" under this definition were later proven to be so beyond any doubt. Many later obtained judgments in civil proceedings where they had to prove their innocence by clear and convincing evidence. In forty-four cases DNA has already led to apprehension of the real assailant. For example, Kirk Bloodsworth of Maryland was a free man for 10 years after his conviction and death sentence were vacated and charges dismissed based on new DNA evidence, yet during that time had to endure public comments from prosecutors and others that they "believed he was still involved" in the rape/murder, but couldn't prove it to a jury. It was not until a "hit" on the real perpetrator was made in the DNA databank in 2003 that these prosecutors conceded Mr. Bloodsworth was entirely innocent, and graciously apologized to him for their error.

This Question also asks whether DPIC's list accurately reveals "only six cases resolved on federal habeas" and the implications of that fact, if true. As a preliminary matter, I am not entirely sure that even DPIC's innocence list is limited to six such cases. Perhaps we have a different definition of what "resolved on federal habeas" means, but my cursory review of the cases listed on the group's website reveals at least fifteen capital cases in which the exonerated individual's conviction was overturned by a federal habeas court.[4] Sometimes, as in the Ron Williamson case, the federal reversal was followed by subsequent proceedings in state court which revealed new evidence of innocence and "resolved" the cases. But these individuals would almost surely have been executed or denied further review were it not for the federal habeas court's intervention – Mr. Williamson, for example, was measured for a coffin and came within *five days* of execution before relief was granted -- so they are equally probative of the critical role that federal habeas serves in our justice system.

[4] These include Joseph Green Brown (FL); Robert Wallace (GA); Federico M. Macias (TX); James Creamer (GA); Gary Gauger (IL); Ricardo Aldape Guerra (TX); Benjamin Harris (WA); Curtis Kyles (LA); Ronald Wiliamson (OK); Clifford Henry Bowen (OK); Eric Clemmons (MO); Charles Irvin Fain (ID); Gordon "Randy" Steidl (IL); James "Bo" Cochran (AL); Ernest Willis (TX).

More fundamentally, however, two related points must be emphasized when considering the impact of S.1088 on the actually innocent.

First, in addition to those exonerated as a direct result of federal habeas, *because the substantive and procedural requirements of AEDPA are already so stringent*, there are a number of unquestionably innocent individuals who were *wrongfully denied relief by the federal habeas courts*. Two such men exonerated by DNA evidence – Darryl Hunt of North Carolina and Brandon Moon of Texas – traveled hundreds of miles to attend the July 13th hearings. In Mr. Hunt's case, the 4th Circuit flatly rejected his actual innocence claim, even though he already had DNA evidence in hand proving that he was not the man who deposited semen in the rape/murder victim in his case; it was only because further DNA testing (obtained in a subsequently-filed state court proceeding) yielded a DNA databank hit on the true perpetrator that Mr. Hunt is a free man today, and the federal courts' callous rejection of his innocence claim appears quite deficient in hindsight. In Mr. Moon's case, a request for the same DNA testing that proved his innocence of rape in 2004 was dismissed by the federal courts as "patently frivolous" in 1999. Federal habeas, though ultimately unsuccessful, proved fortuitous in his case, however; had he not doggedly pursued that claim in federal court throughout the 1990s, the precious DNA evidence that secured his freedom in 2004 would not have been preserved during those proceedings, but would instead have been purged in a "clean-out" of the police property room that took place in the late 1990s. Another exonerated man who could not attend the hearings, Earl Washington of Virginia (who is mentally retarded, and falsely confessed to a rape-murder he did not commit), also had his meritorious claims of innocence -- including proof that he was excluded from the crime scene evidence through non-DNA science -- rejected by both state and federal habeas courts post-AEDPA. It was only because an emergency stay of execution was granted so that DNA testing could be conducted that he was able to obtain subsequent DNA testing which proved his innocence and led to a gubernatorial pardon.

Rather than rush to pass a bill which would further curtail the ability of individuals like these to avail themselves of federal habeas review, I hope the Committee will consider how we can *expand* the protections offered to the innocent, so as not to have such cases "fall through the cracks" in the future.

Second, I trust the members of the Committee would all agree that whether we are talking about 6, 16, or 1,600 innocence cases – and whether those cases all involve the ultimate penalty of death, or "only" decades of imprisonment -- any sweeping legislative action which might deprive even one of those individuals of the ability to prove his or her innocence should only be enacted only upon a clear showing of need, with any new restrictions as narrowly tailored as possible. I respectfully submit that nothing close to that showing has been made to date, and that the all but certain costs of this radical "reform" bill are far too great to ask even one wrongfully convicted individual to bear in its absence.

Question from Senator Patrick Leahy
Posed to Barry C. Scheck
"Habeas Corpus Proceedings and Issues of Actual Innocence" (S.1088)

Question. *You testified at the hearing that S. 1088 would have prevented several wrongly convicted death row inmates from obtaining federal habeas relief and being exonerated. Please elaborate on that testimony*

Answer

Our nation's criminal justice system has, with good reason, long served as a model for other free societies around the world. But we are increasingly learning just how fallible even our system can be when it comes to the imprisonment and execution of our citizens.

Indeed, in the one month since I appeared before this Committee, the organization I co-founded, the Innocence Project, has witnessed three new and powerful reminders of that sobering truth. On July 29, prosecutors in Burlington County, New Jersey joined a successful motion to vacate the conviction of our client Larry Peterson, wrongfully convicted of rape and murder in 1987 (and charged capitally, though sentenced to life), based on a series of DNA test results which all conclusively proved that semen and skin cells from the perpetrator came from another, single male. Mr. Peterson had been convicted based on flawed hair analysis and on the perjured testimony of an informant who claimed he knew details of the crime that "only the perpetrator could know." On August 1, our client Thomas Doswell of Pittsburgh was proven innocent and exonerated of a 1986 rape by DNA testing, despite the unwavering – but ultimately, we learned, mistaken – positive identification made by the victim. Mr. Doswell had challenged the highly suggestive ID procedures used in the case and sought DNA testing to prove his innocence eight years earlier, but his petition was dismissed because it was filed three weeks late. And most dramatically, on August 3, Mr. Luis Diaz of Florida, a 67-year old father and grandfather, was finally exonerated and made a free man, after a staggering *26 years in prison* for a series of rapes that DNA finally proved he did not commit. No fewer that eight separate victims (later shown to have been under heavy pressure from the police to select Mr. Diaz) had previously identified him as the notorious "Bird Road Rapist" – but DNA proved that they were tragically mistaken, and Mr. Diaz paid an unimaginable price for those errors.

All of us should be truly humbled by the fact that the finest justice system in the world continues to uncover such cases with shocking frequency. And given that each of these individuals – like so many of their counterparts around the nation – were repeatedly denied relief by the courts for years prior to their ultimate exonerations, it is hard to imagine that the Senate is even considering a bill that would curtail judicial review in such a dramatic fashion. Even truly unfettered access to DNA testing (which is far from a reality in most states in the nation) cannot ensure that we identify all, or even most, of the legitimate claims of innocence in our nation's prisons and death rows. It is therefore imperative that we examine these cases of innocence and ask how we can ensure that our federal habeas courts give serious constitutional claims *more* searching review, not less – including broader access to meaningful discovery, and less

deference to state court judgments that are premised on inadequate factual investigation by overburdened counsel. By subjecting virtually all such claims to the impossible test of 28 U.S.C. §2254(e), we are going in precisely the wrong direction to remedy our system's ills.

This is particularly so, I must add, given that recent months powerful new evidence has emerged suggesting that at least two innocent men in this country were not just wrongfully sentenced to death, but *wrongfully executed* after the courts and the clemency process failed to bring the truth to light.

First, in December 2004, a *Chicago Tribune* investigation revealed that Calvin Willingham of Texas, sentenced to die for the 1991 arson murder of three daughters, had been executed *based on a forensic analysis of the alleged arson that the Texas courts have acknowledged is no longer valid.* The new forensics cast grave (if not certain) doubt as to whether Mr. Willingham's "crime" was even arson at all, or was in fact an accidental fire as he had proclaimed from the time of his arrest until the moment he was strapped to the gurney. Ironically, it was the case of another death row inmate, Ernest Willis, who was *exonerated* several months after Mr. Willingham's execution, which brought the truth about this discredited arson "science" to light. In the fall of 2004, after Mr. Willis (represented *pro bono* by the law firm of Latham & Watkins, costing the firm millions of dollars over many years) won federal habeas relief on other grounds, the conscientious prosecutor who reviewed the case prior to retrial submitted the arson evidence to a leading expert for the state, Gerald Hurst. Dr. Hurst explained that in the years since Mr. Willis' 1987 conviction, arson analysis had evolved considerably, to the point where no expert in the field would now agree that the "evidence" cited in Mr. Willis' case showed proof of anything other than an accidental fire. Based on Dr. Hurst's assessment, the prosecutor dismissed all charges against Mr. Willis, and he was set free after 18 years on death row.

Mr. Willingham was not so fortunate. But this was not because he did not have expert evidence of discredited science on his side; quite the contrary. Just prior to his execution, Mr. Willingham's attorneys submitted a detailed affidavit from the same expert used by prosecutors in the Willis case, Gerald Hurst, which cited numerous "critical errors in interpreting the evidence" by the state's experts at trial, and concluded that there was no reliable proof that Mr. Willingham's family had died as a result of arson at all. That affidavit, apparently, came too late, as Governor Perry allowed the execution to proceed on February 17, 2004.

Why Ernest Willis is a free man, while Calvin Willingham is a dead man, is a question that can only be answered by a rigorous review of both cases and the legal proceedings in each over the course of nearly two decades. Perhaps, with sufficient resources, Mr. Willingham's attorneys might have earlier introduced this critical scientific evidence in federal court, rather than rely on the discretion of the Governor or the original prosecutors to find that a mistake had been made. I am hopeful that Governor Perry's newly-created Texas Criminal Justice Advisory

Council will undertake that review, and perhaps this body will do the same.[5] But until that time, it is difficult to imagine that such a dramatic curtailment of the right to seek judicial review of death sentences in this country should be adopted.

Those who would see Mr. Willingham's case as an aberration should not forget the recent revelation of what appears highly likely to be another wrongful execution: that of Larry Griffin of Missouri. The same week that this Committee held its first hearings on S.1088, District Attorney Jennifer Joyce of St. Louis announced that her office will undertake an unprecedented post-execution review of one of its own death penalty cases, based on compelling new evidence suggesting that Larry Griffin was not the man who committed a brutal drive-by shooting in 1980 – including the sworn statement of a surviving victim who is positive that Mr. Griffin (whom he knew personally from the neighborhood) was not the assailant.

Questions from Senator Mike DeWine
Posed to Barry C. Scheck
"Habeas Corpus Proceedings and Issues of Actual Innocence" (S.1088)

Question 1: *Please review the attached lists of cases submitted by Barry Scheck and discuss whether you agree or disagree with this assessment of how those cases would have come out under the Streamlined Procedures Act of 2005, S.1088*

Answer to Question 1:

I stand by my assessment that each of the seven innocent persons on death row listed in the "sample list" attachment previously submitted would have been barred from relief under the version of S.1088 offered by Sen. Kyl. I have recently re-reviewed this list of cases in light of the amendments offered by Sen. Specter and adopted by the Committee on July 28th. Those amendments, among other changes, wisely deleted the provisions of the former Sec. 9, which was the basis for my conclusion that many of these exonerees would have been denied relief. Unfortunately, however, this re-analysis also reveals that four out of these seven individuals (Mr. Williamson, Mr. Yarris, Mr. Clemmons, and Mr. Willis) would still have been denied relief under the current version of S.1088. (Based on the documents I was able to access within this short time period, it appears that the federal habeas decisions granting relief to the other three

[5] For more detailed information about the Willingham and Willis cases, I am including with these responses a copy of testimony I submitted to the Texas State Senate Criminal Justice Committee in hearings this spring. That testimony includes exhibits from both cases, as well as a discussion and information about another troubling case of possible wrongful execution in Texas, that of Claude Jones. In Mr. Jones' case, there still exists DNA evidence which has never before been tested despite being brought to the Governor's attention prior to his December 2000 execution, but which could now put his longstanding claim of innocence to the test of science.

would have survived under S.1088 in light of the deletion of Sec.9. If you wish me to conduct a more thorough inquiry into these three cases by accessing unpublished state court documents, which may reveal that the meritorious federal claims would not have met the new S.1088 requirements, I am happy to do so).

Furthermore, with all the attention given to capital cases, it should not be forgotten that the protections of the Great Writ extend equally to citizens who suffer the nightmare of wrongful incarceration, not just those facing the death penalty. That is why I also submitted a second "sample list" of non-capital exonerees who would have been barred from relief under Sen. Kyl's bill. Unfortunately, because the provisions under which each of these individuals would have been barred from relief (Sec. 2, 3, and/or 4 of the bill) remain largely intact under Sen. Specter's bill, the impact of the bill would have been the same under this version. In addition, Prof. Justin Brooks of the California Western School of Law has compiled and previously submitted a memo outlining four additional illustrative innocence cases from California alone (the state most often cited by proponents of S.1088 on the issue of procedural delay). Prof. Brooks concluded, and I agree, that the meritorious claims of each of these individuals were ignored or rejected by state courts, and the critical federal habeas review that led to their exonerations would have been precluded under both versions of S.1088.

Thus, while Sen. Specter should be commended for taking a step in the right direction by deleting Sec. 9 from the proposed bill, the remaining sweeping changes to the law would still have a devastating impact on many, many innocent petitioners. One cannot help but have great sympathy for the families of crime victims who must wait years for the proceedings in their loved ones' cases to be resolved, and I vigorously support further study and analysis to determine how best to remedy any unwarranted delays in capital cases that have not already been cured by AEDPA. But the unspeakable harm that will be suffered by another class of victims – innocent citizens in prison and on death row – if the SPA becomes law certainly deserves equal consideration at this critical juncture.

Question 2: *Please review the four cases cited by Seth P. Waxman in his testimony before the Committee on the Judiciary and discuss whether you agree or disagree with his assessment of how those cases would have come out under the Streamlined Procedures Act of 2005, S. 1088.*

Answer to Question 2

I concur with the analysis offered by Mr. Waxman as to each of these cases, including the result that would ensue under the Specter amendments to S.1088.

QUESTIONS POSED BY CHAIRMAN ARLEN SPECTER
RELATING TO FEDERAL HABEAS CORPUS AND
SENATE BILL 1088

RESPONSES OF BRYAN STEVENSON

August 19, 2005

1. **In your written testimony, you focus on the inability of Alabama and other state systems to adequately provide defense counsel to indigent defendants at either the trial or the post-conviction stages. The AEDPA has attempted to address this concern by creating a provision which is designed to accelerate the habeas process on the condition that state "op-in" by enacting procedures to ensure effective capital representation of indigent defendants in state post-conviction relief proceedings. However, as Mr. Cattani notes in his testimony, in nearly ten years that this "opt-in" procedure has been in effect, no state has been able to demonstrate that its defense representation qualifies. Since you clearly feel that higher quality representation would greatly help post-conviction defendants obtain meaningful habeas review, and you appear to acknowledge in your testimony there is considerable confusion and delay in current application of habeas law, what changes might be made to the "opt-in" provision to ensure that the states have more compelling incentives to provide high quality defense council?**

Contrary to the impression created at the senate hearings, AEDPA's opt-in provision is working for states that are serious about making progress. Arizona has been approved for opt-in review by the Ninth Circuit in cases where improved access to counsel has been in effect throughout the review process. The Ninth Circuit recognized that Arizona had "established a system that, on its face, entitled the state to opt in to the procedures of Chapter 154." *Spears v. Stewart*, 283 F.3d 992, 1018 (9th Cir. 2002). However, the court found that the state was not entitled to the opt-in benefits in that particular case because the system had

not operated in the required manner in that case. *Id.* at 1019.[1]

Most states have not aggressively sought opt-in status because they perceive the restrictions imposed on all habeas petitioners by the AEDPA to be effective and the burden of providing adequate counsel - and in some states, the burden of providing counsel - to be too great. In Alabama, for example, we have no system for providing counsel to death row prisoners whatsoever. Any attorney appointed to represent a death row prisoner is subject to a ridiculous cap on compensation of $1000.

[1] While the Ninth Circuit has held that California is not entitled to enforcement of the opt-in benefits in cases pending before 1998 because, prior to 1998, California's appointment statute did not comply with the eligibility requirements of Chapter 154 of the AEDPA , the Ninth Circuit has not had occasion to review California's new mandatory system for the appointment of collateral counsel in death penalty cases. *Ashmus v. Woodford*, 202 F.3d 1160, 1165 (9th Cir. 2000) ("[U]ntil at least January 1, 1998 (the effective date of California's appointment statute), California's unitary review scheme did not comply with the eligibility requirements of Chapter 154 of the AEDPA").

In fact, many states have conceded that they are not entitled to opt-in status when the issue has arisen in litigation.[2] Moreover, in many states that are actively carrying out executions, there have been efforts to reduce funding for legal services to assist death row prisoners in the last few years rather than strengthen services for the purpose of postconviction review and opt-in status. In the states of the Fifth and Eleventh Circuits, which account for 52% percent of all executions carried out in the United States and 37% of America's death row population,[3] there have been constant efforts to cut or reduce funding for representation of death row prisoners and indigent defense.[4]

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[2]There are states, for example, like Indiana, and Oklahoma that have conceded that they have not satisfied the requirements of Chapter 154, and many other states have tacitly conceded that Chapter 154 does not apply by simply not asserting that they have complied. *See, e.g.,* **Indiana**: *Burris v. Parke*, 95 F.3d 465, 468 (7th Cir. 1996) (en banc) ("Indiana concedes it [has not] satisfied certain [opt-in] conditions for the processing of capital cases within the state court system"). **Oklahoma**: *Williamson v. Ward*, 110 F.3d 1508, 1513 n.5 (10th Cir. 1997) (Oklahoma "conceded . . . that it is not a qualifying state for purposes of [Chapter 154]"). **Georgia**: *Fugate v. Turpin*, 8 F. Supp. 2d 1383, 1386 n.1 (M.D. Ga. 1998), *aff'd sub nom. Fugate v. Head*, 261 F.3d 1206 (11th Cir. 2001) ("The State has not asserted that the new expedited measures should apply in this case, and the court now holds that they do not"). **Idaho**: *Leavitt v. Arave*, 927 F. Supp. 394, 396 (D. Idaho 1996) (state makes no claim that its procedures are sufficient to meet Chapter 154 requirements). **Illinois**: *Thomas v. Gramley*, 951 F. Supp. 1338, 1341 n.3 (N. D. Ill. 1996) (state does not claim that it has satisfied conditions of Chapter 154). **North Carolina**: *Allen v. Lee*, 366 F.3d 319, 349 n.8 (4th Cir. 2004) (en banc) (concurring opinion of Gregory, J., representing views of majority of en banc court) ("At no time during the pendency of this case has North Carolina argued that it has complied with AEDPA's opt-in requirements, yet it bears the burden of establishing such compliance to be entitled expedited habeas review."); *Williams v. French*, 146 F.3d 203, 206 n.1 (4th Cir. 1998) (North Carolina "does not maintain that it has satisfied the opt-in requirements of Chapter 154").

[3]See Death Penalty Information Center, Execution Database (July 20, 2005), available at http://www.deathpenaltyinfo.org/executions.php (indicating that these states account for 509 of the 974 executed inmates executed in the Post-Furman era); NAACP Legal Defense Fund, Death Row USA (Spring 2005) (indicating that as of April 1, 2005, these states account for 1,293 of the 3,452 inmates on death row nationwide).

[4]Inadequate funding continues to leave **Florida's** postconviction offices in a state of crisis. *See* Amy K. Brown, *State Courts Face Budget Reductions: But the Budget Ax Falls Deeper into Other Branches,* Florida Bar News January 1, 2002 ("Funding for state attorneys, public defenders, and capital collateral regional counsels has been cut by a total of 2.3 percent -- about $ 18.8 million dollars. However, $ 10 million in trust funds has been allotted, for a net reduction of $ 8.8 million."); Craig Pittman, *High Court Won't Halt Executions*, St. Petersburg Times, June 18, 1999 (citing Spangenberg Group study concluding that CCR needs additional $ 25-million to do their job properly, but the Legislature gave them $ 8-million; Robert Spangenberg, president of the Spangenberg Group, concluded that "Florida has reached a crisis of overwhelming proportions far greater than I found [twelve years ago]."); Rachel Tobin Ramos, *Death Case Lawyers May Lose Funding*, Fulton County Daily Report, April 15, 2003 ("The **Georgia** Legislature may eliminate funding for an agency that handles death penalty appeals for indigents, even as it debates how to

While the procedural advantages AEDPA provides in the "opt-in" context have worked for states that are serious about making progress, it is the perception of the AEDPA as sufficiently restrictive and efficient that has led many of the death belt states to leave death row prisoners without counsel. Clearly, one way to change this picture is to make the system costly for states that do nothing to provide assistance of counsel to death row prisoners. AEDPA already envisions this by providing that a petitioner can effectively by-pass state postconviction altogether where "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. 2254(b)(1)(B)(ii). This provision should be strengthened to explicitly provide that petitioners who cannot obtain adequate legal representation are not required to exhaust state post-conviction remedies that – although available in theory – actually operate only to defeat the petitioner's valid federal constitutional challenges.

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reform the state's indigent defense system. The Senate has proposed a budget that cuts the state's entire $800,000 allocation to the Georgia Appellate Practice & Educational Resource Center, a six-lawyer state agency that handles habeas corpus appeals for indigent death row inmates."); Bill Rankin, *Defending the Poor: Part Three*, The Atlanta Journal-Constitution, April 23, 2002 at 1A ("In **Louisiana**, about a decade ago, a national consulting firm recommended the state spend $20 million a year to meet the needs of its indigent defense program. Legislators responded by increasing the budget --- by $7.5 million. And there have been no increases since then. In some parishes (counties), lawyers labor under crushing caseloads.")

2. In your written statements, you assert that complex legislative attempts, such as AEDPA, which seek to make meaningful procedural and timing guidelines have resulted in "less reliable, fair and accurate administration of justice." You also argue that S. 1088 "will unnecessarily add to this complexity and ironically create dozens of procedural questions that may delay cases for years." However, in his testimony, Mr. Waxman says that he is "aware of no data demonstrating that the streamlining provisions of the AEDPA have failed to accomplish their purpose." How can we reconcile these two perspective of the current state of affairs? Can you give us some more insight how and why the AEDPA scheme is not working? And why is it that those such as Mr. Waxman seem convinced that the AEDPA system is not flawed as others suggest?

There can be no doubt that the AEDPA created complex procedural questions that caused years of delay in habeas corpus litigation. Since AEDPA's enactment in 1996, the United States Supreme Court and the lower federal courts have faced numerous constitutional and procedural questions that created lengthy litigation to interpret the AEDPA.[5] The SPA would overturn much of this precedent and create a similar wave of litigation and delay.

[5]*See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000) (after four years, clarifying how to apply AEDPA's "contrary to . . . clearly established [Supreme Court] law" or "involved an unreasonable application of clearly established [Supreme Court] law" standard); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (restrictive interpretation of AEDPA provision rejected because "writ of habeas corpus plays a vital role in protecting constitutional rights . . . [and] Congress expressed no intention [in enacting AEDPA provision at issue] to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal."); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (literal interpretation of AEDPA rejected to avoid "implications for habeas practice" that the Court concluded "would be far-reaching and seemingly perverse" consequence that some habeas corpus petitioners would never "receive an adjudication of [their] . . . claim[s]" in federal court and because "[i]t would close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent").

Mr. Waxman expressed identical concerns in his testimony before the senate judiciary committee stating:

> [A]nytime the Congress legislates in a wholesale fashion to substantially revise procedures, particularly in the criminal area, particularly in the post-conviction area, a wave of litigation is generated, raising statutory interpretive questions and constitutional questions. And we are now only emerging from that wave of litigation with respect to AEDPA. And I fear – I think it is a certainty – that this legislation will generate a wave of litigation, both interpretive and constitutional, that will take the Federal courts years to adjudicate rather than streamlining these procedures.

Habeas Corpus Proceedings and Issues of Actual Innocence: Hearing on S.B. 1088 Before the Senate Comm. on the Judiciary, 109th Cong. 36 (2005) (statement of Seth P. Waxman).

I do not understand Mr. Waxman's position as stated in his testimony before the Senate Judiciary Committee to be that the AEDPA is not flawed. Instead, I view his position to be that conclusions about the effectiveness and fairness of the AEDPA cannot be evaluated without study. In his testimony before the judiciary committed, Mr. Waxman's first reason for opposing the SPA was the absence of such a study:

> But my bottom-line point with respect to AEDPA is I am not aware of any study, systematic or otherwise, or a collection of data that looks at the effectiveness or ineffectiveness in AEDPA in reducing the particular targeted problems that we were all and that the Congress of the United States legislated to fix.

Habeas Corpus Proceedings and Issues of Actual Innocence: Hearing on S.B. 1088 Before the Senate Comm. on the Judiciary, 109th Cong. (2005) (testimony of Seth P. Waxman). I agree with Mr. Waxman that it is gravely misguided to undertake a major overhaul of the habeas corpus process without a serious evaluation of the effectiveness of the AEDPA in reaching the goal of efficiency without further study. What is clear, however, is that the SPA would do little to advance the goal of efficiency in habeas corpus review of death penalty and would in fact undermine the fair and reliable review of death penalty cases.

Whatever inefficiencies persist can be readily addressed without a wholesale revision of habeas corpus procedure and the years of litigation that such revision necessarily generates. Mr. Waxman and I are therefore in agreement that if there are persisting "inefficiencies . . . there are forthright ways to address them." *Habeas Corpus Proceedings and Issues of Actual Innocence: Hearing on S.B. 1088 Before the Senate Comm. on the Judiciary*, 109th Cong. 1 (2005) (statement of Seth P. Waxman). For example, in the handful of cases that are delayed inexplicably there are procedural remedies that currently exist to move cases forward when there has been inordinate delay. Pursuant to the All Writs Act, 28 U.S.C. § 1651, a litigant can petition to the appellate court to order a writ of mandamus directing the district court to rule where there has been an unreasonable delay.[6] District courts have endorsed the use of other sanctions, short of dismissal, such as

[6] *See Johnson v. Rogers*, 917 F.2d 1283, 1284-85 (10th Cir. 1990) (granting writ of mandamus that directed district court to rule on habeas corpus petitioner's motion for summary judgment, which had been pending for 14 months; noting that if delays of this length due to court backlogs "were routinely permitted, the function of the Great Writ would be eviscerated"); *Jones v. Snell*, 572 F.2d 1278, 1280 (8th Cir. 1978) (fourteen month delay on petition following remand was unreasoanble); *McClellan v. Young*, 421 F.2d 690 (6th Cir. 1970) (granting writ of mandamus where decision on habeas petition had been inordinately delayed due to crowded docket).

forfeiture of defenses, for substantial and unwarranted delay in answering a habeas corpus petition or for other unfair or disruptive behavior. [7] Until just this past December, Rule 9(a) of The Rules Governing § 2254 Cases afforded federal courts the option of dismissing federal habeas petitions if the State was prejudiced in its ability to respond by delay in the filing of the petition.[8]

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[7] *See Bleitner v. Wiborn*, 15 F. 3d 652, 653-54 (7th Cir. 1994).

[8] *See Garlotte v. Fordice*, 515 U.S. 39, 46-47 (1995) ("under Habeas Corpus Rule 9(a), a district court may dismiss a habeas petition if the State 'has been prejudiced in its ability to respond to the petition by [inexcusable] delay in its filing'"). Rule 9(a) was eliminated in the amendments to these rules which took effect on December 1, 2004. The Committee Note explains that this provision was deleted "as unnecessary in light of the applicable one-year statute of limitations . . ., added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d)."

Finally, most jurisdictions that have experienced problems have implemented internal operating rules and procedures that have facilitated more efficient review. For example, in order to address the "problem of delay in collateral review of capital convictions and sentences," the Fourth Circuit has adopted the accelerated timetable for judicial resolution of capital cases set forth in the AEDPA's opt-in provision.[9] In an attempt to avoid "piecemeal litigation of federal habeas petitions filed by state prisoners" and thereby streamline the federal habeas process, the Eleventh Circuit utilized its supervisory power and ordered district courts to resolve all claims for relief in a federal habeas petition, whether relief is granted or denied.[10]

Consequently, state prosecutors and habeas petitioners have litigation tools available to move stalled cases forward if they choose to use them. If there are problems in particular circuits, requests can be made to modify operating procedures as many federal circuits have already done. Passing legislation that completely eliminates the jurisdiction of federal courts to enforce constitutional protections is misguided and simply not needed.

3. Your written testimony indicates that the changes proposed in the Streamlined Procedures Act would work in tandem with under-funded and ineffective state defense council measures to make habeas claims even more difficult for state-convicted inmates to pursue. If states were able to adequately address the funding problems that you believe make them unable to provide competent representation in post-conviction cases, would some of your concerns be alleviated? If adequate defense council were provided, what would remain your most prominent concern under this Act?

It would be a huge step forward if states provided adequate representation, but the procedures surrounding review have to be fair and reliable. However, adequate representation in state postconviction proceedings does not ensure adequate and fair state postconviction review.

For example, in Alabama the reliability and fairness of state proceedings is jeopardized by partisan judicial elections; therefore judicial rulings in death

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[9] *Truesdale v. Moore*, 142 F. 3d 749, 759 (4th Cir. 1998); *see also Allen v. Lee*, 366 F.3d 319, 349 n.8 (4th Cir. 2004) (*en banc*) (Gregory, J., concurring).

[10] *Clisby v. Jones*, 960 F.2d 925, 935 (11th Cir. 1992); *see also Callahan v. Campbell*, 396 F.3d 1287 (11th Cir. 2005).

penalty cases are highly politicized. Review in death penalty cases that is directly influenced by electoral politics is not likely to be independent, fair or reliable.

The reliability and fairness of Alabama's state postconviction proceedings is further undermined by the universal practice of trial courts in signing orders prepared by the state. Circuit courts routinely adopt batteries of factual findings and sign orders denying postconviction relief that have been prepared by the state's lawyers.[11] Unrepresented prisoners' legal claims, instead of being reviewed by a neutral and impartial judge, are picked over and dispatched by the State Attorney General's Office, which *de facto* composes all of the factual findings and rulings of law that control the litigation process. The A.G.'s Office typically uses this power to dispose of claims on grounds that will create a procedural bar to consideration of their merits in subsequent federal habeas corpus proceedings.

The SPA does nothing to address these problems. In fact, the SPA would further compound these problems by eliminating the ability of federal courts to remedy the unconstitutional convictions and sentences that are overlooked in these state court proceedings. *See, e.g.,* SPA §§ 2,4,9. For example, SPA's section 4(a) would strip federal courts of jurisdiction to consider constitutional issues that were "procedurally barred" in state court, no matter how arbitrary the "bar" is, or whether the state court made a mistake in imposing the "bar," or whether the defendant had a legitimate reason for failing to comply with the state rule. The effect of this provision would be to eliminate habeas corpus as a mechanism for federal courts not only to remedy egregious constitutional violations that have been overlooked by state courts - as in the cases of *Lee v. Kemna*, 534 U.S. 362 (2002) and *Wiggins v. Smith*, 539 U.S. 510 (2003) - but also to confront

[11] The Attorney General's Office typically submits a computer disk containing the proposed order, with instructions for the judge on how to adapt it to produce a document that will be upheld on appeal.

longstanding issues that threaten the fairness and integrity of the criminal justice system.[12]

[12] *See, e.g., Banks v. Dretke*, 540 U.S. 668 (2004). Delma Banks challenged his death sentence after learning that the prosecutor hid evidence that its central sentencing phase witness had lied. Because the prosecutor suppressed this evidence, the evidence was never presented to the state courts. Applying the doctrine of cause and prejudice, the Court found that Banks had cause for failing to present this evidence in state court "because the State persisted in hiding [witness's] informant status and misleadingly represented that it had complied in full with its Brady disclosure obligations'." Sections 2 and 4 of the SPA would overturn the Supreme Court's cause and prejudice analysis and preclude petitioners like Delma Banks from obtaining federal habeas relief.

Finally, under the SPA, a state would qualify for opt-in status if it provides a system for the appointment of counsel in state postconviction, even if the state fails to provide adequate representation at the trial and sentencing stages. From the standpoint of justice and fairness, it makes no sense to give states like Alabama the procedural benefits of Chapter 153 in death penalty cases when the state capped appointed counsel's compensation at $1000 in 72% percent of those cases.[13] In these cases, providing adequate representation during state postconviction proceedings - where very few claims are cognizable – will not protect the many innocent people and others who have been illegally and unfairly convicted and sentenced.

While small steps have been made to confront the problems of inadequate funding for indigent defense at trial, the reality is that there are thousands of people who have been wrongly convicted and sentenced as a result of unreliable and underfunded legal assistance. There are obviously other problems contributing to wrongful convictions but it is clear that it is only through postconviction proceedings and federal habeas corpus review in particular that we can protect many innocent people and others who have been illegally and unfairly convicted and sentenced.

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[13] *See* ALA. CODE § 15-12-21(d) (1996). On June 10, 1999, compensation for appointed attorneys was increased to $50 per hour for in-court work and $30 per hour for out-of-court work. The 1999 amendment removed the cap for in-court work in capital cases but fees for out-of-court work remained capped at $1000. Effective October 1, 2000, compensation for appointed attorneys increased to $60 per hour for in-court work and $40 per hour for out-of-court work and the $1000 cap on out-of-court fees in capital cases was eliminated. ALA. CODE § 15-12-21(d) (2002).

QUESTIONS POSED BY THE
UNITED STATES SENATE JUDICIARY COMMITTEE
RELATING TO FEDERAL HABEAS CORPUS AND
SENATE BILL 1088

RESPONSES OF BRYAN STEVENSON

July 27, 2005

1. In what percentage of cases has there been any demonstrated problem with efficient review of federal habeas corpus petitions that delays implementation of a sentence?

There has been no systematic review or demonstration of problems relating to delay in federal habeas corpus review. Delay in the execution of sentence is not even conceivable in 99% of all federal habeas corpus filings. Between 1995 and 2004, 99% of all federal habeas filings were made by prisoners who are not under a sentence of death and consequently their punishment is in no way being delayed or avoided.[1] Almost every habeas petitioner has a compelling incentive to achieve efficient and timely review of his claims because he contends that his detention or imprisonment is wrongful.[2] With the exception of section 9, the provisions of the SPA apply to every non-capital habeas case even though such cases present no problem with delay or any articulable need for "streamlined" review. In non-capital cases, whether the case is pending for 5 months or 5 years on federal habeas proceedings has no bearing on the execution of punishment. Petitioners are imprisoned and under active punishment. Consequently, this bill simply does not identify any

[1] Administrative Office of the United States Courts, *2004 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. C-2A, available at http://www.uscourts.gov/judbus2004/appendices/c2a.pdf; Administrative Office of the United States Courts, *1999 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. C-2A, *available at* http://www.uscourts.gov/judbus1999/c02asep99.pdf; Administrative Office of the United States Courts, *1997 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. C-2A, *available at* http://www.uscourts.gov/judicial_business/c2asep97.pdf.

[2] In every federal habeas corpus filing, the petitioner is in some detention or incarceration setting and is currently being "punished." Federal case law does not permit federal habeas corpus review if the person is currently not in "custody." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (where defendant was "incarcerated by reason of the parole revocation" at the time habeas petition filed, "in custody" requirement satisfied); 28 U.S.C. § 2254(a)(West 1994 & Supp. 2001) (petition must be filed "in behalf of a person in custody pursuant to the judgment of a State court"); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 8.1, 8.2 (4th ed. 2001).

possible problem or delay issue in 99% of the cases that will be radically altered by its implementation.

In the small percentage of cases that involve death sentences, execution of a death sentence does not typically take place until the habeas review process is complete. However, even federal habeas petitioners who have been wrongfully convicted of capital murder and sentenced to death are imprisoned, sometimes under very harsh conditions, and are held in punitive confinement during the pendency of habeas litigation. Moreover, there is no reliable evidence of widespread delay or stalled litigation in these cases. Contrary to some assertions, the number of federal habeas filings in death cases is decreasing. There was a **7.4% decrease** in the number of habeas corpus filings in death penalty cases in U.S. District Courts **between 2003 and 2004** (243 filings in 2003 down to 225 filings in 2004); and a **17.8%** decrease in filings when comparing the number of habeas filings in death cases in **2000** with the number of habeas filings in death cases in **2004** (274 filings in 2000 down to 225 filings in 2004).[3]

While there are certain to be cases that take a long time, much of this has to do with changing substantive law or other legitimate problems about the constitutionality of the conviction and death sentence. For example, several cases were stayed while the United States Supreme Court considered important issues about the constitutionality of executing the mentally retarded and juveniles. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 125 S. Ct. 1183 (2005). Since the Court's decision in *Atkins*, several states, including Alabama, have failed to pass statutes prohibiting the execution of the mentally retarded thus leaving it to federal courts to hold fact-finding hearings in some cases and adjudicate these issues with no standards or guidance.[4] Similarly, when the United States Supreme Court redefined the role of the jury in capital cases, *Ring v. Arizona*, 536 U.S. 584 (2002), it required many states, such as Arizona, to implement substantive revisions to its statute. Cases were delayed because of related questions about the retroactivity of *Ring* and other procedural issues which required review by the United States Supreme Court. *See Schriro v. Summerlin*, 542 U.S. 348 (2004).

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[3] Administrative Office of the United States Courts, *2004 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. C-2A, available at http://www.uscourts.gov/judbus2004/appendices/c2a.pdf.

[4] See e.g. *In re Holladay*, 331 F.3d 1169, 1175 (11th Cir. 2003).

There will undoubtedly be a handful of cases that are delayed inexplicably. However, there are procedural remedies that currently exist to move cases forward when there has been inordinate delay. Pursuant to the All Writs Act, 28 U.S.C. § 1651, a litigant can petition to the appellate court to order a writ of mandamus directing the district court to rule where there has been an unreasonable delay. *See Johnson v. Rogers*, 917 F.2d 1283, 1284-85 (10th Cir. 1990) (granting writ of mandamus that directed district court to rule on habeas corpus petitioner's motion for summary judgment, which had been pending for 14 months; noting that if delays of this length due to court backlogs "were routinely permitted, the function of the Great Writ would be eviscerated"); *Jones v. Snell*, 572 F.2d 1278, 1280 (8th Cir. 1978) (fourteen month delay on petition following remand was unreasonable); *McClellan v. Young*, 421 F.2d 690 (6th Cir. 1970) (granting writ of mandamus where decision on habeas petition had been inordinately delayed due to crowded docket). District courts have endorsed the use of other sanctions, short of dismissal, such as forfeiture of defenses, for substantial and unwarranted delay in answering a habeas corpus petition or for other unfair or disruptive behavior. *See Bleitner v. Wiborn*, 15 F. 3d 652, 653-54 (7th Cir. 1994). Until just this past December, Rule 9(a) of The Rules Governing § 2254 Cases afforded federal courts the option of dismissing federal habeas petitions if the state was prejudiced in its ability to respond by delay in the filing of the petition. *See Garlotte v. Fordice*, 515 U.S. 39, 46-47 (1995) ("under Habeas Corpus Rule 9(a), a district court may dismiss a habeas petition if the State 'has been prejudiced in its ability to respond to the petition by [inexcusable] delay in its filing'").[5]

Finally, most jurisdictions that have experienced problems have implemented internal operating rules and procedures that have facilitated more efficient review. For example, in order to address the "problem of delay in collateral review of capital convictions and sentences," the Fourth Circuit has adopted the accelerated timetable for judicial resolution of capital cases set forth in the AEDPA's opt-in provision. *Truesdale v. Moore*, 142 F. 3d 749, 759 (4th Cir. 1998); *see also Allen v. Lee*, 366 F.3d 319, 349 n.8 (4th Cir. 2004) (*en banc*) (Gregory, J., concurring). In an attempt to avoid "piecemeal litigation of federal habeas petitions filed by state prisoners" and thereby streamline the federal habeas process, the Eleventh Circuit utilized its supervisory power and ordered district courts to resolve all

[5] Rule 9(a) was eliminated in the amendments to these rules which took effect on December 1, 2004. The Committee Note explains that this provision was deleted "as unnecessary in light of the applicable one-year statute of limitations . . ., added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d)."

claims for relief in a federal habeas petition, whether relief is granted or denied. *Clisby v. Jones*, 960 F.2d 925, 935 (11th Cir. 1992); *see also Callahan v. Campbell*, 396 F.3d 1287 (11th Cir. 2005).

Consequently, state prosecutors and habeas petitioners have litigation tools available to move stalled cases forward if they choose to use them. If there are problems in particular circuits, requests can be made to modify operating procedures as many federal circuits have already done. Passing legislation that completely eliminates the jurisdiction of federal courts to enforce constitutional protections is misguided and simply not needed.

2. Section 9 of the bill proposes radical revisions to the "opt-in" provisions of the AEDPA. Have you seen a need for such reform of the AEDPA in this area?

There are three important points that relate to opt-in review as proposed by the SPA. **First**, states like Arizona that have made substantial reforms in the provision of counsel for death row prisoners **have received authorization** for opt-in status and there is no need for this legislation. Opt-in review obviously cannot be applied retroactively to prisoners whose appeals proceeded before the required protections were available.[6] However, courts are granting opt-in status in places like Arizona and there is no need for legislative reform on this issue. **Second,** only a couple of states have made significant progress toward creating protections for death sentenced prisoners that would warrant opt-in review in federal habeas proceedings. Many states that have large death row populations have made no significant reforms in providing condemned prisoners counsel. Some states have actually been threatening to cut funding for legal assistance to condemned prisoners in the last few years. **Third**, assigning to federal prosecutors the authority to control the jurisdiction, docket and priorities of federal judges would have enormous implications that would seriously threaten

[6] If a state effectively denies counsel to a condemned prisoner or does not adequately assist a condemned prisoner during the review process from 1985 until 2000, changing the availability of counsel for prisoners in a particular state can only benefit those prisoners who have not yet started the appeals process. It is only in those cases where the protection of adequately trained, compensated and motivated counsel has been available from the beginning of the appeals process that constraints federal habeas review are permissible.

the federal judiciary in areas that transcend federal habeas corpus review. I doubt such authority is constitutional given the separation of powers that the framers intended but I also think it will have a profound impact on business litigation, federal criminal prosecutions and a range of other federal judicial functions that are not the subject of this legislation.

B. The opt-in provision of the AEDPA is working

Contrary to the impression created at last week's hearing, AEDPA's opt-in provision is working for states that are serious about making progress. Arizona has been approved for opt-in review by the Ninth Circuit in cases where improved access to counsel has been in effect throughout the review process. The Ninth Circuit recognized that Arizona had "established a system that, on its face, entitled the state to opt in to the procedures of Chapter 154." *Spears v. Stewart*, 283 F.3d 992, 1018 (9th Cir. 2002). However, the court found that the state was not entitled to the opt-in benefits in that particular case because the system had not operated in the required manner in that case. *Id.* at 1019.[7]

C. Inadequate State Systems of Providing Counsel to Death Row Prisoners Constitutes a Larger Problem for Review of Death Penalty Cases than Opt-in Qualification

Most states have not aggressively sought opt-in status because they perceive the restrictions imposed on all habeas petitioners by the AEDPA to be effective and the burden of providing adequate counsel to be too great. In Alabama, for example, we have no system for providing counsel to death row prisoners. Any attorney appointed to represent a death row prisoner is subject to a ridiculous cap on compensation of $1000.

[7] While the Ninth Circuit has held that California is not entitled to enforcement of the opt-in benefits in cases pending before 1998 because, prior to 1998, California's appointment statute did not comply with the eligibility requirements of Chapter 154 of the AEDPA , the Ninth Circuit has not had occasion to review California's new mandatory system for the appointment of collateral counsel in death penalty cases. *Ashmus v. Woodford*, 202 F.3d 1160, 1165 (9th Cir. 2000) ("[U]ntil at least January 1, 1998 (the effective date of California's appointment statute), California's unitary review scheme did not comply with the eligibility requirements of Chapter 154 of the AEDPA").

In fact, many states have conceded that they are not entitled to opt-in status when the issue has arisen in litigation.[8] Moreover, in many states that are actively carrying out executions, there have been efforts to reduce funding for legal services to assist death row prisoners in the last few years rather than strengthen services for the purpose of postconviction review and opt-in status. In the states of the Fifth and Eleventh Circuits, which account for 52% percent of all executions carried out in the United States and 37% of America's death row population,[9] there have been constant efforts to cut or reduce funding for representation of death row prisoners and indigent defense.[10]

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[8]There are states, for example, like Indiana, and Oklahoma that have conceded that they have not satisfied the requirements of Chapter 154, and many other states have tacitly conceded that Chapter 154 does not apply by simply not asserting that they have complied. *See, e.g.,* **Indiana**: *Burris v. Parke*, 95 F.3d 465, 468 (7th Cir. 1996) (en banc) ("Indiana concedes it [has not] satisfied certain [opt-in] conditions for the processing of capital cases within the state court system"). **Oklahoma**: *Williamson v. Ward*, 110 F.3d 1508, 1513 n.5 (10th Cir. 1997) (Oklahoma "conceded . . . that it is not a qualifying state for purposes of [Chapter 154]"). **Georgia**: *Fugate v. Turpin*, 8 F. Supp. 2d 1383, 1386 n.1 (M.D. Ga. 1998), *aff'd sub nom. Fugate v. Head*, 261 F.3d 1206 (11th Cir. 2001) ("The State has not asserted that the new expedited measures should apply in this case, and the court now holds that they do not"). **Idaho**: *Leavitt v. Arave*, 927 F. Supp. 394, 396 (D. Idaho 1996) (state makes no claim that its procedures are sufficient to meet Chapter 154 requirements). **Illinois**: *Thomas v. Gramley*, 951 F. Supp. 1338, 1341 n.3 (N. D. Ill. 1996) (state does not claim that it has satisfied conditions of Chapter 154). **North Carolina**: *Allen v. Lee*, 366 F.3d 319, 349 n.8 (4th Cir. 2004) (en banc) (concurring opinion of Gregory, J., representing views of majority of en banc court) ("At no time during the pendency of this case has North Carolina argued that it has complied with AEDPA's opt-in requirements, yet it bears the burden of establishing such compliance to be entitled expedited habeas review."); *Williams v. French*, 146 F.3d 203, 206 n.1 (4th Cir. 1998) (North Carolina "does not maintain that it has satisfied the opt-in requirements of Chapter 154").

[9]*See* Death Penalty Information Center, *Execution Database* (July 20, 2005), available at http://www.deathpenaltyinfo.org/executions.php (indicating that these states account for 509 of the 974 executed inmates executed in the Post-*Furman* era); NAACP Legal Defense Fund, *Death Row USA* (Spring 2005) (indicating that as of April 1, 2005, these states account for 1,293 of the 3,452 inmates on death row nationwide).

[10]Inadequate funding continues to leave **Florida's** postconviction offices in a state of crisis. *See* Amy K. Brown, *State Courts Face Budget Reductions: But the Budget Ax Falls Deeper into Other Branches,* Florida Bar News January 1, 2002 ("Funding for state attorneys, public defenders, and capital collateral regional counsels has been cut by a total of 2.3 percent -- about $ 18.8 million dollars. However, $ 10 million in trust funds has been allotted, for a net reduction of $ 8.8 million."); Craig Pittman, *High Court Won't Halt Executions*, St. Petersburg Times, June 18, 1999 (citing Spangenberg Group study concluding that CCR needs additional $ 25-million to do their job properly, but the Legislature gave them $ 8-million; Robert Spangenberg, president of the Spangenberg Group, concluded that "Florida has reached a crisis of overwhelming proportions far greater than I found [twelve years ago]."); Rachel Tobin Ramos, *Death Case Lawyers May Lose*

D. Federal Prosecutors Should Not Have Controlling Authority over Federal Jurisdiction in Death Penalty Cases

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Funding, Fulton County Daily Report, April 15, 2003 ("The **Georgia** Legislature may eliminate funding for an agency that handles death penalty appeals for indigents, even as it debates how to reform the state's indigent defense system. The Senate has proposed a budget that cuts the state's entire $800,000 allocation to the Georgia Appellate Practice & Educational Resource Center, a six-lawyer state agency that handles habeas corpus appeals for indigent death row inmates."); Bill Rankin, *Defending the Poor: Part Three*, The Atlanta Journal-Constitution, April 23, 2002 at 1A ("In **Louisiana**, about a decade ago, a national consulting firm recommended the state spend $20 million a year to meet the needs of its indigent defense program. Legislators responded by increasing the budget --- by $7.5 million. And there have been no increases since then. In some parishes (counties), lawyers labor under crushing caseloads.")

The modern death penalty has been sanctioned by the United States Supreme Court based on a promise that capital cases will be afforded heightened review and scrutiny. *Woodson v. North Carolina*, 428 U.S. 280 (1976). In an adversarial system, authority over jurisdiction, fair review and the scope of litigation in these complex and serious cases cannot be turned over to the prosecutorial function. Even United States Attorneys General at the local level have complained about improper discretionary judgements from the Attorney General with regard to capital prosecutions in the federal system.[11] Assigning the opt-in authority to federal prosecutors cannot be reconciled with the separation of powers required by the United States Constitution.

3. What would be the consequence of restricting the jurisdiction of federal courts in habeas corpus review under sections 6 and 9 of the SPA? Would the absence of federal habeas review create an increased risk of arbitrary, racially discriminatory or illegally imposed sentences of death?

[11] *See* David Hechler, *U.S. Death Penalty in Wake of Ashcroft, Will Gonzales Loosen AG's Grip?* National Law Journal, Nov. 29, 2004 at 1; Julia Preston, *Killers Get Life Sentences In Setback to Justice Department*, N.Y. Times, Aug. 6, 2004, at B2

Sections 6 and 9 of SB 1088 would eliminate habeas corpus review as a vehicle for confronting some of the most insidious problems in the criminal justice system. Federal habeas corpus has been a primary mechanism for federal courts to confront racial discrimination in the composition of grand and petit jury lists,[12] prosecutor's racially discriminatory use of peremptory strikes,[13] and prosecutorial misconduct in withholding exculpatory and impeachment evidence.[14] The SPA would eliminate the ability of federal courts to confront these and other longstanding issues that threaten the fairness and integrity of the criminal justice system.

Moreover, the combined effect of Sections 6 and 9 would be to eliminate review of critically important sentencing issues in death penalty cases. The bill would not only take away federal court jurisdiction to determine the legal standard applicable to ineffective assistance of counsel claims

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[12] *See, e.g., Amadeo v. Zant*, 486 U.S. 214 (1988) (finding, on habeas corpus review, that jury selection pursuant to district attorney's deliberate scheme, set forth in handwritten memorandum to jury commissioners, to underrepresent blacks and women); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (finding, on habeas corpus review, that grand jury selection process systematically excluded blacks); *Castaneda v. Partida*, 430 U.S. 482 (1977) (Mexican-American habeas corpus petitioner suffered intentional discrimination in grand jury selection process; only 39% of those summoned for grand jury service were Mexican-American although that group accounted for 79% of county population); *Berryhill v. Zant*, 858 F.2d 633 (11th Cir. 1988) (granting habeas corpus relief where grand and petit juries drawn from jury pool in which women were unconstitutionally underrepresented because jury commissioner decided to stop including women after women comprised 10% of pool); *Davis v. Zant*, 721 F.2d 1478 (11th Cir. 1983), *aff'd*, 752 F.2d 1515 (11th Cir. 1985) (en banc) (habeas relief granted where jury drawn from list which unconstitutionally underrepresented women and blacks); *Gibson v. Zant*, 705 F.2d 1543 (11th Cir. 1983) (habeas relief granted where grand and petit juries drawn from venire which unconstitutionally excluded women and blacks); *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982) (habeas relief granted where grand jury and petit jury drawn from venires in which women were unconstitutionally underrepresented).

[13] *See, e.g., Miller-El v. Dretke*, 125 S. Ct. 2317 (2005) (habeas corpus petitioner presented clear and convincing evidence that State's explanations for its peremptory strikes to remove ten of eleven black venire members were pretextual); *Bui v. Haley*, 321 F.3d 1304 (11th Cir. 2003) (habeas corpus relief granted on claim that prosecutor struck potential jurors on the basis of race); *Cochran v. Herring*, 43 F.3d 1404 (11th Cir. 1995), *modified,* 61 F.3d 20 (11th Cir. 1995) (affirming grant of habeas corpus relief where district court found that race was a determining factor in the prosecution's exercise of its peremptory challenges).

[14] *See, e.g., Banks v. Dretke*, 540 U.S. 668 (2004) (finding, on habeas corpus review, that prosecutor violated *Brady v. Maryland*, 373 U.S. 83 (1973) by illegally hiding evidence that its central sentencing phase witness was paid for his role in setting Banks up); *Kyles v. Whitley*, 514 U.S. 419 (1995) (finding, on habeas corpus review, that prosecutor's failure to disclose exculpatory and impeachment statements violated *Brady*).

under the Sixth and Fourteenth Amendments,[15] but also the adequacy of the state review process afforded to inmates in states which do nothing to provide death row prisoners, or any other incarcerated person, counsel for postconviction review.

[15] For example, federal courts would have no jurisdiction to review Terry Williams' death sentence. Mr. Williams' appointed counsel failed to prepare for sentencing until a week beforehand and failed to uncover extensive records documenting Mr. Williams' "nightmarish" childhood and mental impairments. The Supreme Court found that the Virginia Supreme Court's decision affirming Mr. Williams' death sentence was unreasonable because it relied on *inapplicable* Supreme Court precedent instead of the governing legal standards of *Strickland v. Washington*, 466 U.S. 668 (1984). *See Williams v. Taylor*, 529 U.S. 362 (2000).

For example, Alabama makes no provision whatever to give condemned inmates any sort of legal assistance in preparing and presenting post-appeal petitions challenging those sentences.[16] Moreover, death-row prisoners in Alabama who can get a petition timely filed within the statute of limitations cannot typically obtain independent judicial factfinding or decisionmaking without the assiduous efforts of competent and dedicated counsel. Alabama's elected circuit judges[17] routinely adopt batteries of factual findings and sign orders denying relief that have been prepared by the state's lawyers.[18] Unrepresented prisoners' legal claims, instead of being reviewed by a neutral and impartial judge, are picked over and dispatched by the State Attorney General's Office, which *de facto* composes all of the factual findings and rulings of law that control the litigation process. The A.G.'s Office typically uses this power to dispose of claims on grounds that will create a procedural bar to consideration of their merits in subsequent federal habeas corpus proceedings. For death-row prisoners, federal habeas corpus review under current AEDPA standards represents the first opportunity to obtain independent judicial reviews of the adequacy and constitutionality of the state process. This bill would eliminate federal jurisdiction to undertake this review.

4. At the hearing, you and Senator Kyl expressed different views on the operation of section 2 of S.1088. According to Senator Kyl, section 2 would ensure that "whatever the procedural problems with the State court, you could always have the Federal habeas reviewed if you have [clear evidence of innocence]." Do you agree with this reading of the bill? Would it help or hinder you in the case you discussed, involving a probably innocent person whose case is bottled up in state post-conviction proceedings?

I would be greatly relieved if this proposed legislation would be helpful for innocent death row prisoners like Anthony Ray Hinton. However, my continued review of the bill has confirmed my initial understanding that Mr. Hinton could not obtain federal court review of his unexhausted claims without the futility doctrine which this bill eliminates.

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[16] ALA. CODE § 15-12-23 (1975) (as amended by Act 99-427 (1999)).

[17] ALA. CONST. art. VI, § 152 ("All judges shall be elected").

[18] The Attorney General's Office typically submits a computer disk containing the proposed order, with instructions for the judge on how to adapt it to produce a document that will be upheld on appeal.

During the senate hearings discussing the amendments to the Anti-Terrorism and Effective Death Penalty Act of 1996, Senator Kyl argued that under his bill, Anthony Ray Hinton, a death row inmate in Alabama, could have his innocence claims heard in federal court despite a failure to exhaust them in state courts. He stated that the "Streamlined Procedures Act of 2005" would actually "make it easier, not more difficult" to have the claim heard in federal court. In support of this position, he argued:

> Under current law, a defendant has to exhaust the claims for relief in State court, including these actual innocence claims. In Section 2 of our bill, we change the requirement by amending the current 28 USC provision to provide that each claim in a Federal petition must either be exhausted in State court or must present clear evidence of innocence, this new evidence that we have talked about. So the bill would add a new provision that even if the claim had not been exhausted in State court, you could go forward with Federal habeas if you have this kind of innocence.

Section 2 of this proposed legislation allows review of an unexhausted claim only:

> (B)(i) if the application presents a claim for relief that would qualify for consideration on the grounds in subsection (e)(2); **and**
>
> (ii) the denial of such relief is contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Accordingly, Section 2(B)(i)'s cross-reference to (e)(2) requires that for a habeas petitioner to have an unexhausted claim considered in federal court, the petitioner must show that:

> (A) the claim relies on--
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; ***and***
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. 2254(e)(2) (emphasis added). While 2254(e)(2)(B) speaks to innocence, the use of the conjunction "and" as it connects 2254(A) and (B) requires that innocence alone does not suffice; rather, a claim that relies on innocence must be coupled with a showing that the petitioner is either entitled to the benefit of a retroactively applied rule of constitutional law pursuant to 2254(e)(1)(A)(i), or has established a factual predicate that could not have been discovered through the exercise of due diligence under 2254(e)(1)(A)(ii).

The Hinton case does not present a retroactive new rule. It similarly does not involve a situation where the evidence of innocence could not have been discovered through the exercise of due diligence. Many innocence cases rely on evidence that was not presented at trial as a result of ineffective assistance of counsel. Sometimes wrongful conviction of the innocent is a function of bad science or the introduction of unreliable evidence that is not adequately rebutted. Mr. Hinton's case presents both of these problems but it would not satisfy the due diligence standard of (e)(2). That language was formulated to restrict second federal habeas petitions and was intended to make sure habeas petitioners do everything they are supposed to before the first federal habeas filing. The (e)(2) language may be appropriate for successive filings where petitioners have previously challenged their convictions in federal court, but it is terribly unfair for first federal habeas applicants who present unexhausted claims.

Accordingly, though Mr. Hinton's claims satisfy 2254(e)(1)(B), his claims would not pass the 2254(e)(1)(A) prerequisites to this provision. As such, a federal court would be barred from considering his unexhausted innocence claims under this Act. Under existing law however, Mr. Hinton could assert that the state court process is not responsive to his claims and therefore federal review might be available under 2254(b)(1)(B)(ii), a provision that this bill expressly attempts to eliminate.

Additionally, this bill imposes another requirement on Mr. Hinton's unexhausted claim of innocence which is that he must demonstrate that denial of his claim would contradict clearly established United States Supreme Court precedent. Under current law, this language is only triggered when the state court has reviewed

a claim and issued a judgment that should be given appropriate deference. The point of review in Mr. Hinton's case would be to facilitate review of the claim which the state has failed to provide. Under current law, Mr. Hinton would only have to demonstrate that his constitutional rights have been violated. This proposed legislation would create an added obligation on Mr. Hinton that there be clearly established precedent relating to factual innocence before he could obtain relief. There arguably is no such precedent at this time which is part of the concern triggered by the Supreme Court's recent certiorari grant in *House v, Bell*, No. 04-8990.

By imposing on unexhausted claims the currently inapplicable requirement of an "unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," the SPA creates a new obstacle for innocent prisoners like Mr. Hinton. Even for those petitioners who, unlike Mr. Hinton, can satisfy the requirements of 2254(e)(2), the absence of any clearly established and freestanding "innocence" jurisprudence formulated by the United States Supreme Court would prevent review in many innocence cases and increase the likelihood of executions of the innocent. *See Herrera v. Collins*, 506 U.S. 390, 404 (1993) (holding that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.")

For the reasons set forth above, Mr. Hinton could not pass either hurdle of Section 2's exception for unexhausted claims and I believe this language would present serious obstacles to exoneration of innocent prisoners.

5. Based on your years of experience litigating federal habeas cases, are there any changes that you would like to see to "streamline" or otherwise improve the process?

There are three things Congress could do that would dramatically improve the efficiency and fairness surrounding federal habeas corpus review of state court convictions. **First**, Congress should add "opt-out" provisions to current law that would eliminate federal deference to state court judgments where state court decisions are the product of review proceedings where adequately trained, compensated and skilled counsel has not been provided or where state court judges have refused to make independent findings and rulings that are not prepared by state advocates. **Second**, Congress should strip away procedural rules that have made review of basic constitutional issues needlessly complex and created a review process that requires highly specialized skills and expertise resulting in time-consuming litigation and delay. **Third**, Congress should authorize merits review of any constitutional claim raised by a prisoner facing execution unless there is a finding that the

claim presented has been intentionally withheld from state court for some tactical advantage.

1. "Opt-out" Provisions for Federal Habeas Review

There are huge disparities in what states do to provide counsel or to ensure fair and reliable review in state court cases. Many states have opted to continue administering criminal justice with grossly underfunded and inadequate indigent defense systems which necessarily contribute to federal habeas corpus filings required to enforce constitutional protections. Many states impose ridiculously low caps on compensation for capital case work in indigent cases and necessarily make reliable and fair imposition of the death penalty or other criminal sanctions suspect. Some states judges as a result of political pressures or out of indifference or disdain for the constitutional rights of the imprisoned refuse to provide fair, independent or reliable review of claims of relief. These judges sign orders prepared by state prosecutors that are lengthy findings of fact and rulings of law.

These states have effectively opted not to provide the kind of review that the AEDPA assumes when it imposes on federal judges the obligation to defer to state court rulings and findings or otherwise protects state court judgements. It is only through allowing the petitioner to establish that deficiencies in the state court review process warrant a suspension of the deference provisions of the AEDPA that any meaningful hope of reform can be created in many states. The current incentives to improve indigent defense have been ineffective and disincentives to maintain the status quo with regard to counsel are now required to promote fairness, efficiency and reliability in criminal cases.

B. Eliminating Unnecessary Procedural Complexity

The most casual review of federal habeas corpus decisions reveals a jurisprudence that has now been overwhelmed with a series of very complex procedural requirements that make litigation in this area ill-advised for any attorney who is not highly skilled with specialized training and expertise. Moreover, these procedural requirements have consumed the litigation process and resulted in years of litigation and time-consuming adjudication of technical issues that are often unrelated to fair administration of criminal justice. Statutes of limitation for non-capital petitioners simply have no jusitification. Constraints on evidentiary hearings when a federal judge believes that such a hearing is required to ensure a conviction or sentence is constitutional and a multitude of procedural issues resulting from poorly drafted and unclear language could all be eliminated with modifications that simplified habeas review. Simplifying habeas corpus review by asking that federal judges first determine if constitutional rights have been violated in a particular case and then making sure that remedy of that violation is warranted would make the process much clearer and less technical.

C. Authorizing Merits Review of Constitutional Claims Presented By Death-Sentenced Prisoners

The astonishing number of innocent people who have been exonerated after being sentenced

to death requires that Congress re-evaluate the procedural web and barriers that have shielded review of so many death penalty cases. A compelling basis now exists for requiring federal judges who are presented with habeas corpus petitions from death row prisoners to review on the merits every claim of a constitutional violation unless a showing can be made that the petitioner has intentionally forfeited review by withholding a claim for tactical reasons. The restrictions created by the AEDPA with regard to second or successive petitions create protections from abuse of the writ of habeas corpus.

Merits review of constitutional claims in a first federal habeas corpus application would make review infinitely simpler and efficient and legitimately streamline the process. The assortment of procedural issues that dominate federal habeas corpus litigation could be avoided with such a reform. This would shorten the review process in capital cases and improve reliability and fairness in these cases dramatically. In the 1970's, the Supreme Court opined that "death is different." The presumption is that society would give greater review in these cases because the punishment imposed a greater obligation on a just society to be accurate and reliable. There can be no question that execution of a prisoner should not be accompanied by unanswered questions about the condemned person's innocence or the legality of his/her conviction or sentence.

I believe these kinds of reforms could streamline review in habeas corpus cases and would pose no challenge to states that are committed to constitutional administration of criminal justice.

6. Several members of the Committee expressed an interest in knowing if this proposed legislation would overturn any existing precedent. Have you indentified cases in your circuit that would be altered by this bill?

Yes. There are at least a dozen recent United States Supreme Court cases and many Eleventh Circuit cases that would be overturned by this legislation. The list of sample cases below provides some of the existing protections of constitutional rights that could be eliminated by this proposed legislation.

UNITED STATES SUPREME COURT CASES:

Banks v. Dretke, 540 U.S. 668 (2004)

SYNOPSIS: Petition for habeas corpus and new trial granted where prosecution had withheld exculpatory and impeachment evidence at trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). State courts ruled that Banks did not preserve or diligently develop his *Brady* claim.

CHANGES UNDER NEW BILL: 1) Under SPA § 4 (a) (2), Banks's *Brady* claim could not

have been brought in federal court because the state courts had found it to be procedurally defaulted. 2) The Court noted that they applied the pre-AEDPA law to this case because it began before 1996; SPA § 14 makes the AEDPA standards retroactive and thus imposes the stricter exhaustion requirements of SPA § 2. 3) Because this is a capital case, if the Attorney General had certified Texas's capital postconviction scheme under SPA § 9 (c), Banks's constitutional claim could not be brought within the narrow exceptions of SPA § 9 (b).

Wiggins v. Smith, 539 U.S. 510 (2003)

SYNOPSIS: Counsel ineffective where trial attorneys failed to conduct reasonable investigation into petitioner's life history and thereby failed to uncover and present powerful mitigating evidence that petitioner experienced severe privation, abuse and repeated rape while in foster care.

CHANGES UNDER NEW BILL: 1) Under SPA § 6 no federal review would have been available because the Maryland courts found that Wiggins's attorney's failure to investigate at the sentencing phase was harmless. 2) Because this is a capital case, if the Attorney General certified Maryland's capital post conviction defense scheme under SPA § 9 (c), the ineffective assistance of counsel claims could not be raised under the narrow exceptions of SPA § 9 (b)

Lee v. Kemna, 534 U.S. 362 (2002)

SYNOPSIS: State rule was not an adequate ground to bar federal review of petitioner's claim that the denial of a continuance deprived him of due process, when rule applied (requiring that continuance motions be in writing) was an "exorbitant application of a generally sound rule [that] renders the state ground inadequate to stop consideration of a federal question."

CHANGES UNDER NEW BILL: Because the state court found the claim procedurally barred, the case would not have reached the federal courts under SPA § 4 (a) (2). There would be no federal mechanism to determine whether the procedural bar was constitutionally valid.

Miller-El v. Dretke, 125 S. Ct. 2317 (2005)

SYNOPSIS: Writ of habeas corpus and new trial granted on claim that prosecution struck black jurors on the basis of race. Texas state courts found the prosecutor's reasons not pretextual but the Supreme Court disagreed, finding that petitioner presented clear and convincing evidence that State's explanations for its peremptory strikes to remove 10 of 11 black veniremembers were pretextual.

CHANGES UNDER NEW BILL: Because this is a capital case, if the U.S. Attorney General

had certified Texas's capital post conviction scheme under SPA § 9 (c), the only challenges available in a capital case could come from either a new constitutional rule made retroactive under the Supreme Court standard in *Teague v. Lane*, 440 U.S. 1031 (1989), or through proof of actual innocence. *See* SPA § 9 (b). The new bill eliminates the third possible ground for federal review that AEDPA provided for in capital cases. *See* 28 U.S.C. 2264 (a) (1) (1996) (claim may be raised if failure to raise it is "the result of State action in violation of the Constitution or laws of the United States"). Under this new, stricter standard, because Miller-El could establish neither a *Teague* claim nor proof of innocence, there would be no federal review.

Rompilla v. Beard, 125 S. Ct. 2456 (2005)

SYNOPSIS: Writ of habeas corpus where petitioner's trial lawyers failed to investigate prior conviction and other mitigation evidence for the sentencing phase of the trial. Pennsylvania state courts found no ineffective assistance of counsel on postconviction review.

CHANGES UNDER NEW BILL: 1) Because the ineffective assistance of counsel claim is only raised with regards to the sentencing phase, section 6 of the Streamlined Procedures Act of 2005 ("SPA") would prevent federal courts from reviewing the claim if the state courts had found it harmless. 2) If the Attorney General had certified Pennsylvania's capital postconviction defense scheme under SPA § 9 (c), there could be no federal review of ineffective assistance of counsel claims under SPA § 9 (b).

Penry v. Johnson, 532 U.S. 782 (2001)

SYNOPSIS: Instruction given to jury that it may consider mitigating circumstances of mental retardation and childhood abuse was insufficient in satisfying requirements of the Eighth and Fourteenth Amendments where jury form listed only aggravating circumstances, thereby creating an ineffective and illogical mechanism to give effect to mitigating evidence.

CHANGES UNDER NEW BILL: 1) Under SPA § 6, the federal courts would not have had the power to review error at the sentencing phase because the Texas state courts found that error to be harmless. 2) Because this is a capital case, if the Attorney General certified Texas's capital postconviction defense scheme under SPA § 9 (c), claims of jury instruction error could not be raised under the narrow exceptions of SPA § 9 (b).

Williams v. Taylor, 529 U.S. 362 (2000)

SYNOPSIS: Writ of habeas corpus granted where Virginia Supreme Court relied on inapplicable Supreme Court precedent of *Lockhart v. Fretwell*, 506 U.S. 364 (1993) instead of governing legal standard of *Strickland v. Washington*, 466 U.S. 668 (1984) in assessing counsel's ineffectiveness for failing to present available mitigating evidence at the sentencing phase of a capital trial. This wrong application was "contrary to, [and] involved an unreasonable application of, clearly established Federal law" and, therefore unfairly denied petitioner relief.

CHANGES UNDER NEW BILL: 1) Under SPA § 6, the federal courts would not have had the power to review error at the sentencing phase because the Virginia state courts found that error to be harmless. 2) Because this is a capital case, if the Attorney General certified Virginia's capital postconviction defense scheme under SPA § 9 (c), claims of ineffective assistance of counsel could not be raised under the narrow exceptions of SPA § 9 (b).

11th CIRCUIT HABEAS CASES

Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003)

SYNOPSIS: Counsel ineffective for failure to present mitigating evidence at the penalty phase of a capital trial despite the existence of evidence relating to petitioner's mental health, alcohol and drug abuse, erratic behavior, dysfunctional family life, mental and physical abuse, and suicide attempts.

CHANGES UNDER NEW BILL: 1) Under SPA § 6, no federal review would have been allowed because the state courts had determined that the error at the sentencing phase was harmless. 2) Because this is a capital case, if the Attorney General had approved of Florida's postconviction defense scheme under SPA § 9 (c), no claims of ineffective assistance of counsel could be brought at all because of the new limited exceptions in SPA § 9 (b).

Hunter v. Moore, 304 F.3d 1066 (11th Cir. 2002)

SYNOPSIS: Where court announced verdict without affording any opportunity to object to lack of closing argument, defendant was deprived of effective assistance of counsel.

CHANGES UNDER NEW BILL: Because this is a capital case, if the Attorney General had approved of Florida's postconviction defense scheme under SPA § 9 (c), there would be no federal review available here because ineffective assistance of counsel claims do not fall within the exceptions noted in SPA § 9 (b).

Eagle v. Linahan, 279 F.3d 926 (11th Cir. 2001)

SYNOPSIS: Counsel found ineffective in non-capital, malice murder case, for failing to raise preserved, meritorious *Batson v. Kentucky*, 476 U.S. 79 (1986) claim on direct appeal where prosecution used all nine of its peremptory strikes to excuse black venire members and trial judge stated on the record that he believed that the prosecution had used peremptory strikes to remove blacks on account of their race. Georgia state courts found that petitioner's ineffective assistance of counsel claims were procedurally defaulted because they were not raised on appeal.

CHANGES UNDER NEW BILL: Under SPA § 4 (a) (2), the state courts' ruling that the ineffective assistance of counsel claims were procedurally barred would have prevented federal review. This would be especially true because the ineffective assistance of counsel claim related to a *Batson* claim which the courts also found to be procedurally barred.

Reynolds v. Chapman, 253 F.3d 1337 (11th Cir. 2001)

SYNOPSIS: Writ of habeas corpus granted in non-capital case where attorney for petitioner had conflict of interest at both pre-trial and post-trial phases. Attorney was part of defense team that represented two of petitioner's co-defendants who received more favorable pleas than petitioner and then represented another co-defendant at the "motion for a new trial phase". Writ granted where petitioner did not discover this fact until his second federal habeas proceeding.

CHANGES UNDER NEW BILL: After the new information about conflict of interest came to light, the federal court referred the case back to state court, but the Georgia courts found that the petition was successive because Reynolds had already petitioned twice and thus procedurally barred. Under SPA § 4 (a) (2), this procedural bar would have prevented federal review of conflict of interest claim.

Romine v. Head, 253 F.3d 1349 (11th Cir. 2001)

SYNOPSIS: Granting habeas relief as to death sentence where prosecutor improperly referred to Biblical passages indicating that death is mandatory and State failed to assert procedural bar to the claim in its pleadings.

CHANGES UNDER NEW BILL: 1) Because of the proposed changes to 28 U.S.C. § 2254 (h) (1) (b) in SPA § 4 (a) (2), it is likely that the State's failure to assert the procedural bar would not be seen as a waiver and that the claim would remain procedurally barred, thereby preventing federal review. 2) SPA § 6 would bar federal review because the relief was specifically granted at the sentencing phase, where the state courts had found the error to be harmless.

Judd v. Haley, 250 F.3d 1308 (11th Cir. 2001)

SYNOPSIS: Granting writ of habeas corpus in non-capital trial where trial judge closed off courtroom to public in violation of 6th Amendment. Alabama state courts found Judd's claim to be procedurally defaulted, but 11th Circuit determined that the state grounds were insufficient to support a procedural default because the state did not apply its procedures entirely consistently

CHANGES UNDER NEW BILL: The SPA is specifically designed to overcome this particular type of federal review of procedurally defaulted claims. *See* Letter from Congressman Lundgren, *The Need for Streamlined Habeas Corpus Procedures*, June 23, 2005. Under SPA § 4 (a) (2), because the Sixth Amendment claim was found to be procedurally barred by the State, the federal courts would not have been able to review it.

Dobbs v. Turpin, 142 F.3d 1383 (11th Cir. 1998)

SYNOPSIS: Counsel ineffective for failing to investigate and present mitigating evidence and for making inadequate closing argument at penalty phase of capital trial. Court

rejected counsel's explanation that petitioner instructed him not to present mitigating evidence and stated that lawyers may not blindly follow such commands.

CHANGES UNDER NEW BILL: 1) Under SPA § 6, because the focus of relief is on error in the sentencing phase that the state courts found harmless, there would be no federal review. 2) In addition, because this is a capital case, if the Attorney General had approved Georgia's capital postconviction defense scheme under SPA § 9 (c), the ineffective assistance of counsel claim would be barred in federal court under SPA § 9 (b).

Snowden v. Singletary, 135 F.3d 732 (11th Cir. 1998)

SYNOPSIS: On habeas corpus review of non-capital case, finding trial fundamentally unfair where expert forcefully vouched for the credibility of child witnesses in child abuse trial, because the testimony was highly significant and there was no adequate means for petitioner to have countered the expert's contentions. The 11th Circuit found that petitioner's petition was "mixed" with some issues exhausted and others not exhausted in the state courts. The Court decided not to engage in "judicial ping pong" and recognized that the un-exhausted claims were likely to be procedurally barred at the state level, thus the Court heard them all together.

CHANGES UNDER NEW BILL: 1) Under SPA § 2, a mixed petition with some unexhausted state claims must be dismissed with prejudice. 2) Under SPA § 4 (a) (2), the procedurally defaulted claims could not be considered by the federal court.

Taylor v. Singletary, 122 F.3d 1390 (11th Cir. 1997)

SYNOPSIS: Granting habeas relief and new trial where trial court refused to change the order of co-defendants trials, thereby depriving Taylor of the exculpatory testimony of a material witness, his co-defendant. State courts ruled that Taylor's request was procedurally barred because he made it after trial began.

CHANGES UNDER NEW BILL: Because the state courts found that the request was procedurally barred by being too late, under SPA § 4 (a) (2) the Sixth Amendment claim would have been kept from federal review. Even though the co-defendant's testimony was striking and would have been useful, it did not rise to the high standard required SPA § 4 to establish an innocence exception to the procedural bar.

Huynh v. King, 95 F.3d 1052 (11th Cir. 1996) (After passage of AEDPA)

SYNOPSIS: On habeas corpus review, finding 1) trial counsel ineffective for failing to file potentially meritorious suppression motion; 2) armed robbery was a lesser included offense of malice murder for which Huynh was convicted, subjecting him to double jeopardy.

CHANGES UNDER NEW BILL: Because neither side attempted to apply the newly passed AEDPA to this case, the Court did not apply it. Under SPA § 14, any pending case that

commenced before AEDPA would still be subject to its constrictions.

Booker v. Singletary, 90 F.3d 440 (11th Cir. 1996) (After passage of AEDPA)

SYNOPSIS: Habeas relief granted in regard to death sentence where sentencer refused to give weight to non-statutory mitigating evidence in violation of Supreme Court precedent in *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

CHANGES UNDER NEW BILL: Under SPA § 6, because the relief granted was specific to the sentencing phase and because the state courts had found the error to be harmless, there could have been no federal review.

QUESTIONS POSED BY SENATOR MIKE DEWINE
RELATING TO FEDERAL HABEAS CORPUS AND
SENATE BILL 1088

RESPONSES OF BRYAN STEVENSON

August 19, 2005

1. Please review the attached lists of cases submitted by Barry Scheck and discuss whether you agree or disagree with his assessment of how those cases would have come out under the Streamlined Procedures Act of 2005, S. 1088.

Mr. Scheck submitted two lists: (1) Sample List of Innocent People on Death Row Granted Relief in Federal Court; and (2) Supreme Court Cases Affected by the SPA. I discuss these lists in turn.

(1) Sample List of Innocent People on Death Row Granted Relief in Federal Court

I agree that, under the provisions of the SPA, these seven former death row inmates may not have obtained relief in federal court. These cases are significant as illustrations of (1) how the SPA would bar federal review of the unconstitutional trial proceedings that resulted in the conviction of an innocent person and the illusory nature of the extremely narrow "innocence exception" to these provisions, and (2) the SPA's failure to address the greatest problem for fair and efficient review of death penalty cases: the inadequacy of state systems for providing counsel in death penalty cases.

The SPA would have barred federal review of the unconstitutional trial proceedings that resulted in the conviction of persons who were innocent but would have been unable to satisfy the requirements of the SPA's "innocence" exceptions. *See* SPA §§ 2,4. For example, Ernest Willis – who was convicted of murder resulting from a house fire based on evidence the state later recognized as mistaken – obtained relief not because he could demonstrate innocence, but because the state illegally withheld favorable evidence and administered medically inappropriate antipsychotic drugs without his consent in violation of Mr. Willis' constitutional right to due process. *Willis v. Cockrell*, 2004 WL 1812698 (W.D. Tex. Aug. 9, 2004). It was only after he obtained relief on his due process claim and after the federal courts ordered a new trial that the state re-examined the evidence, found their mistakes, concluded that the fire was accidental and issued a formal declaration of innocence and an apology to Mr. Willis.

Without federal review of his due process claim Mr. Willis would not have left death row to face a new trial and the state would not have been forced to re-examine its evidence and find its mistakes. But the SPA would bar federal review of this claim because the Texas appellate court found that Mr. Willis was barred from relief on his claim of involuntary sedation because his counsel failed to object at trial. Under Section 4, a federal court has no jurisdiction to review a constitutional claim found to be procedurally barred by state courts, even where the state's procedural bar rule is in conflict with federal constitutional law.

Nor would Mr. Willis come within Section 4's extremely narrow exception for "innocence." Under the "innocence" exception, a clear and convincing demonstration is only part of the required showing. A claim satisfies the innocence exception only if the claim could not previously have been

raised because it depends upon either (1) a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," or (2) newly acquired facts that "could not have been discovered previously through the exercise of due diligence."[1] Even then, the prisoner must show that the facts "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense, but a viable constitutional claim based either on new law or new facts not previously discoverable through due diligence."[2]

The Willis case does not present a retroactive new rule. It similarly does not involve a situation where the evidence of innocence could not have been discovered through the exercise of due diligence – the evidence of his innocence was presented in state postconviction, and although the original trial judge ruled that Mr. Willis should receive a new trial, the Texas Court of Criminal Appeals reversed.

Accordingly, though Mr. Willis was demonstrably innocent, his claims would not pass the SPA's innocence exception. As such, a federal court would be barred from considering his underlying constitutional claim as well as his claim of innocence.

These cases are also significant because they illustrate that the problem of inadequate state systems for providing counsel – not the procedural rules of AEDPA – pose the greatest problem for review. In the case of Federico Martinez-Macias, both the federal district court and the Fifth Circuit Court of Appeals condemned the underpaid and woefully inadequate defense. The district court found that Mr. Martinez-Macias' trial counsel were paid at an hourly rate of $11.84 and concluded that "[t]he errors that occurred in this case are inherent in a system which paid attorneys such a meager amount." *Martinez-Macias v. Collins*, 810 F. Supp. 782 (W.D. Tex. 1991). The Fifth Circuit opinion affirming the grant of habeas corpus relief stated that "The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for." *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992).

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[1]The language of the SPA's "innocence exception" was originally taken from 2244(b)(2) which was formulated to restrict *second* federal habeas petitions and was designed to "require extraordinary showings before a state prisoner can take a second trip around the extended district-court-to-supreme-court federal track." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 647 (1998) (Scalia, J., dissenting). While that language may be appropriate for successive filings, the SPA extends this requirement to *original* habeas filings. *See* SPA §§ 2,4.

[2]SPA Section 2 imposes another requirement on an unexhausted claim of innocence which is that the inmate must show that denial of relief is contrary to or would entail an unreasonable application of clearly established United States Supreme Court precedent.

Similarly, in the case of Ronald Keith Williamson, who was exonerated by DNA evidence only after the district court ordered a new trial finding that he had been denied the effective assistance of counsel at the guilt-innocence and penalty phases of trial, the federal court found that the wrongful conviction was in part due to state caps on compensation. The district court criticized the state's failure to provide investigative or expert services and the cap on compensation stating "at the time of trial in 1988 the statutory maximum fee, which [defense counsel] received, was $3200. Okla. Stat. tit. 21, § 701.14 (Supp.1985). These factors make it economically unattractive, if not impossible in many circumstances, for appointed counsel to expend the time and effort required to adequately represent a client in a capital case." *Williamson v. Ward*, 110 F.3d 1508, 1522 (10th Cir. 1997).

These problems persist. In my state of Alabama we have no public defender system. With the exception of a few counties, indigent defendants in Alabama receive appointed lawyers from the private bar. The total compensation a lawyer may receive is limited by statute to $1500 to $3500 per case.[3] This includes serious cases where the accused faces life imprisonment. There have even been caps in death penalty cases. Of the 190 people currently on Alabama's death row, 72% percent were represented by appointed lawyers whose compensation for preparing the case was capped at $1000 by state statute.[4]

Inadequate state defense systems continue to result in wrongful convictions and death sentences, yet the SPA does nothing to address this problem. Instead, the SPA would exacerbate this problem by dramatically restricting federal jurisdiction to review unconstitutional trial proceedings in state courts and overruling a long line of Supreme Court and federal circuit precedent establishing the rules for an efficient and constitutional administration of habeas corpus cases. *See* SPA §§ 2,4.

(2) Supreme Court Cases Affected by the SPA

I agree with the Mr. Scheck that the SPA's impact on these cases from the United States Supreme Court would seriously diminish the fairness and reliability of the death penalty in the United States.

The SPA would achieve its jurisdiction-stripping goals only by overturning significant United

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[3] *See* ALA. CODE § 15-12-21 (d) (1-6) (1975).

[4] *See* ALA. CODE § 15-12-21(d) (1996). On June 10, 1999, compensation for appointed attorneys was increased to $50 per hour for in-court work and $30 per hour for out-of-court work. The 1999 amendment removed the cap for in-court work in capital cases but fees for out-of-court work remained capped at $1000. Effective October 1, 2000, compensation for appointed attorneys increased to $60 per hour for in-court work and $40 per hour for out-of-court work and the $1000 cap on out-of-court fees in capital cases was eliminated. ALA. CODE § 15-12-21(d) (2002).

States Supreme Court precedent concerning the procedures governing habeas review. Current habeas law precludes federal habeas court review of the merits of a claim if the petitioner violated an "adequate and independent" state procedural rule, unless the petitioner can show both "cause" and "prejudice." Under this framework, which has been in place for thirty years, a state rule is adequate and independent if the petitioner actually violated a state rule that was established by the state and consistently applied at the time the petitioner broke the rule. Cause and prejudice means that the petitioner must show a valid reason for his or her failure to comply with the rule, and that he or she suffered real, substantial prejudice. In practice, to show cause and prejudice the petitioner must establish state action that interfered with presentation of the claim (such as hiding the evidence) or ineffective assistance of counsel at trial or on a direct appeal (ineffective assistance from state post-conviction lawyers does not qualify).

The SPA would overturn this doctrine. Because Section 4 would recognize only the extremely narrow exception found in 2254(e)(2) to overcome procedural default, considerations of the adequacy or constitutionality of the state procedural rule or whether the default was caused by the state's suppression of the evidence are irrelevant. SPA's section 4(a) would strip federal courts of jurisdiction to consider constitutional issues that were "procedurally barred" in state court, no matter how arbitrary the "bar" is, or whether the state court made a mistake in imposing the "bar," or whether the defendant had a legitimate reason for failing to comply with the state rule.

For example, *the SPA would overturn precedent establishing that "cause" for a procedural default exists if "the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." See, e.g., Murray v. Carrier*, 477 U.S. 478 (1986); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Strickler v. Greene*, 527 U.S. 263 (1999).

This would mean that a federal court would have no jurisdiction to review the death sentence of Delma Banks who challenged his death sentence after learning that the prosecutor hid evidence that its central sentencing phase witness had lied. Because the prosecutor suppressed this evidence, the evidence was never presented to the state courts. Applying the doctrine of cause and prejudice, the Court found that Banks had cause for failing to present this evidence in state court "because the State persisted in hiding [the witness's] informant status and misleadingly represented that it had complied in full with its Brady disclosure obligations'." *Banks v. Dretke*, 540 U.S. 668, 693 (2004) Sections 2 and 4 of the SPA would overturn the Supreme Court's cause and prejudice analysis and preclude petitioners like Delma Banks from obtaining federal habeas relief.[5]

[5] The SPA would likewise overturn other cases establishing that a petitioner has cause for a procedural default where the state concealed illegal misconduct. *See, e.g., Amadeo v. Zant*, 486 U.S. 214 (1988) (finding, on habeas corpus review, that jury selection pursuant to district attorney's deliberate scheme, set forth in handwritten memorandum to jury commissioners, to underrepresent blacks and women).

Under the SPA, a state court's procedural default ruling would deprive federal courts not only of jurisdiction to review the substantive constitutional claim but the adequacy and constitutionality of the state's procedural default rule. The SPA would thus overturn any precedent that provides that a state procedural default rule cannot serve to bar federal review of a constitutional claim if the state procedural rule on its face or as applied is arbitrary or violates due process. The effect would be to eliminate federal review of the cases of innocent persons like Nicholas Yarris[6] and Ernest Willis,[7] as well as those of persons who were wrongfully convicted as a result of egregious state misconduct in

[6]Nicholas Yarris was exonerated by DNA testing after spending 22 years on death row. When he sought state postconviction relief, the Pennsylvania Supreme Court held that all of the claims in his petition were procedurally defaulted because his petition was time-barred under the retroactive application of a new statute of limitations. Mr. Yarris filed a petition for habeas corpus relief in federal court. Reviewing his claim under the AEDPA, and relying on *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991), which allows federal courts to review state court's procedural default determination, the federal court found that the state rule was not the sort of firmly established or regularly followed state practice that can prevent implementation of federal constitutional rights. *Yarris v. Horn*, 230 F.Supp.2d 577 (E.D. Pa. 2002). If Section 4 of the SPA had been enacted at the time he filed for federal habeas corpus relief, *Ford v. Georgia* would no longer be good law and federal courts would have no jurisdiction to review his claims because the Pennsylvania supreme court held that his state postconviction petition was procedurally defaulted.

[7]Ernest Willis spent almost 17 years on Texas' death row before a federal court ordered a new trial on the ground that the state had involuntarily and surreptitiously administered powerful antipsychotic drugs without his consent before and during trial. *Willis v. Cockrell*, 2004 WL 1812698 (W.D. Tex. Aug. 9, 2004). The SPA would have barred a federal court from reviewing this claim because the Texas Court of Criminal Appeals found that Willis defaulted this claim by failing to object at trial to the involuntary medication. Under the AEDPA and existing Supreme Court precedent, however, the district court was required to review the adequacy of the state court's procedural ruling. The federal court found that the procedural bar was inadequate to foreclose federal review because under federal law a criminal defendant who does not know that the state is giving him antipsychotic medication does not waive the constitutional rights implicated by the involuntary medication.

suppressing evidence or eliminating potential jurors based on race, like Delma Banks and Tony Amadeo.

2. Please review the four cases cited by Seth P. Waxman in his testimony before the Committee on the Judiciary and discuss whether you agree or disagree with his assessment of how those cases would have come out under the Streamlined Procedures Act of 2005, S. 1088.

I agree that under the SPA, the four cases Mr. Waxman cited may not have been reviewable in federal court. This is in part due to the jurisdiction-stripping provisions of Sections 2 and 4.

Section 4(a) would strip federal courts of jurisdiction to consider constitutional issues that were "procedurally barred" in state court, no matter how arbitrary the "bar" is, or whether the state court made a mistake in imposing the "bar," or whether the defendant had a legitimate reason for failing to comply with the state rule. Under this provision, federal courts would have had no jurisdiction to consider the petitioner's claim in *Lee v. Kemna*, 534 U.S. 362 (2002), because the state appellate court found that the claim was procedurally barred. In *Lee*, the Court held that state courts had unjustifiably applied a procedural rule to bar consideration of the petitioner's claim that he had been denied due process of law when the trial judge refused to grant even a brief continuance to allow him time to find alibi witnesses who had left the courthouse during trial. The Supreme Court found that the state appellate court arbitrarily applied a rule requiring that motions for a continuance be in writing, even though the defense motion was made in the middle of trial, the trial judge heard the motion and considered it, and the defense substantially complied with the rule by asking for no more than a short continuance to obtain the presence of three crucial alibi witnesses. Under the SPA, a federal court would have no jurisdiction to review the adequacy or constitutionality of the state's procedural bar. As a result, the petitioner would remain on death row having never had *state or federal* review of an otherwise meritorious constitutional claim.

SPA's section 2 would bar review of *Banks v. Dretke*, 124 S. Ct. 1256 (2004). In that case, the prosecutor hid evidence that its central sentencing phase witness had lied. Because the prosecutor suppressed this evidence throughout the trial, direct appeal, and state postconviction proceedings, Mr. Banks could not present the evidence to the state courts. Under U.S. Supreme Court precedent that the SPA would overturn, the failure to produce this evidence in state court precluded Mr. Banks from obtaining an evidentiary hearing in federal court unless he could show cause for failing to develop the evidence in state court and resulting prejudice. Applying the doctrine of cause and prejudice, the Court found that Banks had cause for failing to present this evidence in state court "because the State persisted in hiding [witness's] informant status and misleadingly represented that it had complied in full with its Brady disclosure obligations'." Section 2 would overturn the Supreme Court's cause and prejudice analysis and preclude petitioners like Delma Banks from obtaining federal habeas relief. Had the SPA been in effect at the time Mr. Banks filed his federal habeas corpus petition, the court would have no jurisdiction to order a federal evidentiary hearing or review the merits of Mr. Banks' claim. Mr. Banks would have remained on death row having never obtained review solely because the state had illegally but successfully suppressed evidence that would have shown that he was wrongly sentenced to death.

Federal habeas corpus has been a primary mechanism for federal courts not only to remedy egregious constitutional violations that have been overlooked by state courts - as in the cases of *Lee v. Kemna*, *Banks v. Dretke*, and *Wiggins v. Smith*, 539 U.S. 510 (2003) - but also to confront

prosecutor's racially discriminatory use of peremptory strikes, as in the case of *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005),[8] and racial discrimination in the composition of grand and petit jury lists.[9] The SPA would eliminate the ability of federal court to confront these and other longstanding issues that threaten the fairness and integrity of the criminal justice system.

[8] *See also Bui v. Haley*, 321 F.3d 1304 (11th Cir. 2003) (habeas corpus relief granted on claim that prosecutor struck potential jurors on the basis of race); *Cochran v. Herring*, 43 F.3d 1404 (11th Cir. 1995), *modified*, 61 F.3d 20 (11th Cir. 1995) (affirming grant of habeas corpus relief where district court found that race was a determining factor in the prosecution's exercise of its peremptory challenges).

[9] *See, e.g., Amadeo v. Zant*, 486 U.S. 214 (1988) (finding, on habeas corpus review, that jury selection pursuant to district attorney's deliberate scheme, set forth in handwritten memorandum to jury commissioners, to underrepresent blacks and women); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (finding, on habeas corpus review, that grand jury selection process systematically excluded blacks); *Castaneda v. Partida*, 430 U.S. 482 (1977) (Mexican-American habeas corpus petitioner suffered intentional discrimination in grand jury selection process; only 39% of those summoned for grand jury service were Mexican-American although that group accounted for 79% of county population); *Berryhill v. Zant*, 858 F.2d 633 (11th Cir. 1988) (granting habeas corpus relief where grand and petit juries drawn from jury pool in which women were unconstitutionally underrepresented because jury commissioner decided to stop including women after women comprised 10% of pool); *Davis v. Zant*, 721 F.2d 1478 (11th Cir. 1983), *aff'd*, 752 F.2d 1515 (11th Cir. 1985) (en banc) (habeas relief granted where jury drawn from list which unconstitutionally underrepresented women and blacks); *Gibson v. Zant*, 705 F.2d 1543 (11th Cir. 1983) (habeas relief granted where grand and petit juries drawn from venire which unconstitutionally excluded women and blacks); *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982) (habeas relief granted where grand jury and petit jury drawn from venires in which women were unconstitutionally underrepresented).

Responses to Questions from Senate Judiciary Committee Members Regarding SB 1088

John Pressley Todd
Assistant Attorney General
Capital Litigation Section
Arizona Attorney General's Office

August 19, 2005

August 22, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Specter:

Enclosed are my responses to the questions posed by you and members of your committee following my testimony on July 13, 2005, in the hearing on "Habeas Corpus Proceedings and Issues of Actual Innocence." As part of my responses, I have enclosed a "Survey of Arizona Capital Cases" that should assist the Committee in understanding the extent of delay in habeas proceedings. In brief summary:

Enactment of S.1088, the Streamlined Procedures Act of 2005, as originally proposed, Sections 4 and 6 would not have precluded federal review of any of the cases Mr. Scheck cited as examples of cases involving innocent people on death row. Because none of the jurisdictions had opted-in under Section 9, the effect of that section cannot be assessed. As explained in the materials, it could have had a very positive effect forcing the litigants to focus on the issue of actual innocence. Enactment would focus the federal courts and the parties on the central question of actual innocence.

S.1088 would modify some Supreme Court decisions cited by Mr. Scheck and Mr. Waxman. Because those cases are simply interpreting the federal habeas statutes previously enacted by Congress, it is appropriate that Congress change the statutory law in reaction to identified problems.

As the charts attached to the accompanying "Survey of Arizona Capital Cases" demonstrate, there is a serious problem of delay and lack of finality currently in federal habeas review of state-court judgments, even after Congress' enactment of the AEDPA almost a decade ago.

I have greatly appreciated the opportunity to appear before the Committee. I hope my observations based on my years of experience of practicing in this area of the law have been of some benefit to the Members.

Very truly yours,

John Pressley Todd
Assistant Attorney General

JPT:#122337

HABEAS CORPUS PROCEEDINGS AND ISSUES OF ACTUAL INNOCENCE

QUESTIONS PRESENTED BY CHAIRMAN SPECTER

1. **Mr. Todd, several individuals including some in this hearing have considerable reservations about the Streamlined Procedures Act, specifically section 9 of the bill. Mr. Waxman goes so far as to argue that this section would "flatly repeal basic habeas jurisdiction in death penalty cases."**

   Do you agree with this assessment? Does section 9 go too far in its attempt to make chapter 154 filing deadlines more practical by limiting the claims that can be raised under its provisions to those presenting meaningful evidence that the defendant did not commit the crime?

   In return for a state creating a system to assure high quality post-conviction counsel in death penalty cases, Section 9 treats the first capital habeas petition the same as a successive habeas petition is treated under existing law. *See* 28 U.S.C. § 2244(b)(2). Thus, Section 9 does not "flatly repeal basic habeas jurisdiction" in these cases. It does significantly limit the type of habeas claims available in a capital case. The public policy behind the proposal is to provide incentives to litigate fully a case in state court with quality counsel when the evidence is fresh, rather than relitigate the case long after the main event when the chance of error is greater and the evidence is generally less reliable. Section 9 increases finality in capital cases and enables federal review to be focused, expeditious and affordable.

   Importantly, Section 9 provides two exceptions. First, if there is a legitimate question of actual innocence, federal review is available. Second, if the Supreme Court creates a new rule that is applied retroactively, the capital defendant gets the benefit of the new rule.

   Reasonable attorneys specializing in capital litigation could debate whether Section 9 goes too far or not far enough. Nearly all, however, would agree that the safety valve for a bonafide actual innocence claim is appropriate. Whether an actual innocence claim must be predicated on a showing of due diligence is debatable. The law should not encourage litigants to be less than diligent and to hold back claims in the hope of a more favorable forum. However, as a practical matter, no state will execute an actually innocent person even if his counsel was not diligent.

   Moreover, if a state provides a quality system for post-conviction counsel in death cases, it is expected that experienced counsel will be diligent, so "due diligence" is unlikely ever to be an issue.

   There can be a natural tension in some cases between federal courts enforcing constitutional rights and the criminal justice system's objective of separating the innocent

from the guilty. Is it good public policy to let a clearly guilty murderer go free when a State is unable to re-try a defendant a decade or more after his crime because a federal court disagreed with the State's highest court concerning whether the murderer was deprived of a constitutional right during trial? Resolution of this general question of public policy properly resides with the Congress, which represents the people. Section 9's proposed solution is that the question of actual guilt or innocence is the most important consideration. Hence, the State court's finding that the defendant received a constitutionally fair trial is sufficient. No further review is warranted. This equates the state review system for constitutional error with the federal system, with only one round of direct and collateral review.

2. **In his written testimony, Mr. Waxman states that he is "aware of no data demonstrating that the streamlining provisions of [the 1996] AEDPA have failed to accomplish their purpose," and that "no one has persuasively established that AEDPA has failed in any systematic way to resolve the inefficiencies in federal-court review that prompted its enactment." He concludes that "some death penalty case have taken years to resolve, but we do not know why or, more importantly, whether delays in some cases represent a pattern in the system."**

I would like you to tell me if you share this view. You are a prosecutor who has many years of experience with habeas litigation. Can you tell me, did the 1996 Act solve all of the problems with delays in habeas litigation? In capital cases in particular, have delays been eliminated or reduced? Do you agree that there is no pattern of unreasonable delays in these cases?

The AEDPA was a major step in making federal habeas review more reliable and speedy. However, the Supreme Court's reversals of the Ninth Circuit exemplify the unwillingness of some court cultures to obey this Congress' directives if there is any ambiguity in the law. *See Brown v. Payton*, 125 S.Ct. 1432 (2005); *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *Middleton v. McNeil*, 541 U.S. 433 (2004) (*per curiam*) *Baldwin v. Reese*, 541 U.S. 27 (2004); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (*per curiam*); *Woodford v. Garceau*, 538 U.S. 202 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Woodford v. Visciotti*, 537 U.S. 19 (2003) (*per curiam*); *Early v. Packer*, 537 U.S. 3 (2003) (*per curiam*); *Calderon v. Thompson*, 523 U.S. 538 (1998).

The attached study of the Arizona experience demonstrates that in capital cases there still exists a pattern of unacceptable delay. While capital and non-capital cases share certain characteristics during habeas litigation, delay is far more prevalent in capital cases. Based on the attached review of the Arizona capital cases since enactment of the AEDPA, delay has not been eliminated or even reduced, rather it has been prolonged.

Most of Arizona's capital cases still in Federal District Court were filed after the AEDPA. Only one of the 63 cases filed under the AEDPA has moved from the Federal District Court to the Ninth Circuit. That case has been in the Ninth Circuit for over 5 years. Twenty-eight of Arizona's capital cases have been pending in District Court for between six and eight years.

As discussed in more detail in the attached report, Arizona's Capital Case Commission reviewed Arizona's death penalty convictions from 1974 through July 1, 2000. During that period, the median time it took a capital case from the murder through sentencing was 1.4 years, for the direct appeal 1.4 years, and for the state post-conviction proceeding 5.9 months. In other words, at that time it took a little over three years for a capital case to progress through the state criminal justice system.

In contrast, as the attached report details, one of those cases has been on federal habeas review for over 19 years. Two of those cases have been on federal habeas review

for over 18 years, one for over 16 years, another for over 14 years, still another for over 12 years. These cases alone establish a pattern of unreasonable delay. The attached report shows that these cases are not simply strange aberrations in an other wise smooth functioning system of habeas review.

#122325

HABEAS CORPUS PROCEEDINGS AND ISSUES OF ACTUAL INNOCENCE

QUESTIONS PRESENTED BY SENATOR PATRICK LEAHY

1. **Section 4 of the bill provides that if a state court finds a claim to be procedurally barred, a federal court has no jurisdiction to consider that claim unless (A) the state waives reliance on the procedural bar, or (B) petitioner can demonstrate either that he is actually innocent or that he is relying upon a new legal rule made retroactive by the Supreme Court. Do you understand this to mean that even if there is clear constitutional error and the state court decision finding the claim to be procedurally barred was objectively unreasonable, the federal courts can do nothing to rectify that error?**

Yes, the policy decision supporting Section 4 accomplishes several goals: (1) It reduces litigation over the existence of "cause" and resulting prejudice when a defendant fails to present fairly his constitutional claim in state court so a state court has an opportunity to correct the constitutional error. (2) It provides an additional incentive for a defendant to present his federal claims to the state courts and not be rewarded for his negligence. (3) It favors a criminal justice system that reliably separates the guilty from the innocent over a system that is more concerned with the process than the result.

Most importantly, if a state prisoner has a bonafide claim of factual innocence, the failure to properly exhaust state-court remedies would not bar federal review of the claim. There are many claims of constitutional error that are unrelated to the question of guilt or innocence. A *Miranda* violation, for example, does not automatically establish innocence.

Moreover, there are many practical reasons why the situation posed in the hypothetical question would be exceedingly rare. Assuming "clear" constitutional error, it is unreasonable to believe that both the state trial and appellate attorneys would overlook the error. If it were "clear" constitutional error that affected the outcome of the trial, most state courts would address the error under a plain error or fundamental error standard. If such an error caused a constitutionally unfair trial, the state court would order a new trial. The state court is in a better position to determine if any error caused an unfair trial. There is no empirical evidence in the last decade to suggest that state court judges are less capable than federal court judges. In Arizona, a number of the federal court judges have previously been state court judges. The current policy of allowing federal judges to second guess state-court judges when a litigant does not fairly present his federal claim in state court encourages attorneys to hold back on claims and discourages state courts from reviewing cases for fundamental or plain error.

In fact, as a result of federal court rulings, the Arizona Legislature repealed the requirement that all criminal cases be reviewed by the state appellate courts for fundamental error. When an appellate court in Arizona reviewed the entire record for fundamental error, it did not matter that the defendant procedurally defaulted the issue. If the error were serious

enough, even if it was only an error of state law, a defendant would receive relief in state court through this fundamental error review. Fearing that the Ninth Circuit's decision in *Beam v. Paskett*, 3 F.3d 1301, 1305 (9th Cir. 1993), would open Arizona criminal cases to endless litigation, the Arizona Legislature repealed Ariz. Rev. Stat. Ann. § 13-4035 in 1995. While the Arizona appellate courts no long review the entire record for fundamental error, the courts will review under a fundamental standard of review if an appellate attorney claims that a point not raised in the trial court constitutes fundamental error. Habeas attorneys routinely claim such review constitutes fair presentation even though the state court finds no error and in such circumstances the error certainly is not "clear."

Furthermore, if such a "clear" error existed and both the trial and appellate attorneys and the reviewing courts missed seeing the error, a litigant could still raise it in state court as an ineffective assistance of counsel claim. If the litigant still is not granted relief based on such an underlying claim of constitutional error, it is not reasonable to assume that a federal court under the current AEDPA standard would find the claim entitled to review.

2. Section 9 of S.1099 provides that in an opt-in state, a federal court has no jurisdiction to consider any claims unless the petitioner can demonstrate either that he is actually innocent or that he is relying upon a new legal rule made retroactive by the Supreme Court. Do you understand this to mean that even if there is clear constitutional error and the state court decision refusing to find error was objectively unreasonable, the federal courts can do nothing to rectify that error?

Yes, as I related in answer to Senator Specter's first question, in return for a state creating a system to assure high quality post-conviction counsel in death penalty cases, Section 9 treats the first capital habeas petition the same as a successive habeas petition is treated under existing law. *See* 28 U.S.C. § 2244(b)(2). Thus, Section 9 does not "flatly repeal basic habeas jurisdiction" in these cases. It does significantly limit the type of habeas claims available in a capital case. The public policy behind the proposal is to provide incentives to litigate fully a case in state court with quality counsel when the evidence is fresh, rather than relitigate the case long after the main event when the chance of error is greater and the evidence is generally less reliable. Section 9 increases finality in capital cases and enables federal review to be focused, expeditious and affordable.

Importantly, Section 9 provides two exceptions. First, if there is a legitimate question of actual innocence, federal review is available. Second, if the Supreme Court creates a new rule that is applied retroactively, the capital defendant gets the benefit of the new rule.

Reasonable attorneys specializing in capital litigation could debate whether Section 9 goes too far or not far enough. Nearly all, however, would agree that the safety valve for a bonafide actual innocence claim is appropriate. Whether an actual innocence claim must be predicated on a showing of due diligence is debatable. The law should not encourage litigants to be less than diligent and to hold back claims in the hope of a more favorable forum. However, as a practical matter, no state will execute an actually innocent person even if his counsel was not diligent.

Moreover, if a state provides a quality system for post-conviction counsel in death cases, it is expected that experienced counsel will be diligent, so "due diligence" is unlikely ever to be an issue.

There can be a natural tension in some cases between federal courts enforcing constitutional rights and the criminal justice system's objective of separating the innocent from the guilty. Is it good public policy to let a clearly guilty murderer go free when a State is unable to re-try a defendant a decade or more after his crime because a federal court disagreed with the State's highest court concerning whether the murderer was deprived of a constitutional right during trial? Resolution of this general question of public policy properly resides with the Congress, which represents the people. Section 9's proposed solution is that the question of actual guilt or innocence is the most important consideration. Hence, the State court's finding that the defendant received a

constitutionally fair trial is sufficient. No further review is warranted. This equates the state review system for constitutional error with the federal system, with only one round of direct and collateral review.

#122326

HABEAS CORPUS PROCEEDINGS AND ISSUES OF ACTUAL INNOCENCE

QUESTIONS SUBMITTED BY SENATOR MIKE DEWINE

1. Please review the attached list of cases submitted by Barry Scheck and discuss whether you agree or disagree with his assessment of how those cases would have come out under the Streamlined Procedures Act of 2005, S. 1088.

A. Sample List of Cases:

After carefully reviewing all the published opinions for each of the seven cases listed by Mr. Scheck, I do not believe that the Streamlined Procedures Act of 2005 ("SPA") as originally proposed in S.1088 would have affected the result in any of the cases. In some cases, by focusing the attorneys' attention on the relevant question of innocence, it might have actually resolved the cases earlier.

There are some common aspects to the cases. Mr. Scheck analyzes most of the cases under the opt-in provisions of Section 9. Yet none of the jurisdictions involved ever opted-in by establishing a system to assure the appointment of highly qualified counsel to represent indigent defendants in state post-conviction proceedings. Thus, that analysis is pure speculation. Also, in each case relief was finally granted in state court, often based on events after any federal court involvement.

It is noteworthy that of the seven cases listed, only two—the first two cases—are truly exoneration cases, cases where there is reliable evidence of innocence.

Because it is necessary to read all the published opinions in order to obtain a complete understanding of how the application of the SPA would have affected these cases and how these cases evolved as they proceed through the various state and federal courts, a citation to all the published opinions can be found at the end of discussion of the case.

1. Ronald Keith Williamson – Oklahoma

I disagree with Mr. Scheck concerning how the SPA would have affected this case. The Circuit Court held in their 1997 opinion that Mr. Williamson's counsel had been ineffective on two grounds. Because Mr. Williamson had presented fairly to the Oklahoma courts both grounds, they were exhausted. Under SPA Section 4, because the claims had been exhausted and not procedurally barred the result would be the same; the federal court would order a new trial.

The DNA evidence was developed in the subsequent State proceedings. Unfortunately, I have found nothing in the public record concerning its discovery or the DNA technique used. Polymerase chain reaction DNA and the use of Short Tandem Repeats kits in DNA analysis were not generally available until the late 1990s. Thus, from the readily available public record it is not known when the DNA evidence could have been discovered.

Even if Oklahoma had qualified as an "opt-in" jurisdiction under the SPA Section 9, the results would not have necessarily been different. Under Section 9, the only way in this case to obtain federal review would be to pursue an actual innocence claim. Presumably, the defense would focus on that issue, instead of the multitude of issues they raised. Conceivably, with the focus on the question of guilt or innocence, the defense or prosecution might have discovered the DNA evidence earlier in the proceedings.

Section 6 of the SPA would not be implicated, because Mr. Williamson's ineffective assistance of counsel ("IAC") claims involved trial proceedings as well as sentencing. Even if prevented from granting relief on the sentencing ineffective assistance portion of the claims, the Circuit Court would have granted relief on the guilt stage claims.

Mr. Scheck's assertion that all of Mr. Williamson claims were "procedurally barred" could result from an unfamiliarly with habeas litigation. As a review of all the published court opinions reveals, the statement he relies on arises in the state post-conviction relief ("PCR") proceeding, because Mr. Williamson had already fairly presented most of his claims in his direct appeal, including the two IAC claims.

Mr. Scheck also is mistaken in his statement that the second claim in the Circuit court concerned Glen Gore in any manner. That claim concerned only another person (Ricky Simmons) who had given a videotaped confession. Additionally, Mr. Williamson did not received relief based, as Mr. Scheck states, on his "competency claim." The Circuit Court makes clear it granted relief on counsel's failure to pursue the question of Mr. Williamson's competency.

Mr. Scheck speculates what might have happened if Oklahoma had qualified as an opt-in jurisdiction under Section 9 of the SPA. Unfortunately, it is simply speculation because there are too many variables. With better-qualified counsel, the ineffective assistance problem may have been corrected in the state PCR proceeding. The DNA evidence may have been developed in the state PCR proceeding. It is not reasonable to presume that highly qualified state counsel would not exercise "due diligence." What is not speculation is that if Section 9 applied, the focus of counsel and the courts would be on the question of innocence.

Finally, again perhaps because of lack of familiarity with this area of the law, Mr. Scheck is mistaken concerning the standard the Circuit Court applied. It used the "reasonable probability" standard because it was deciding an IAC claim. The SPA does not change this ineffective assistance of counsel prejudice standard. The Court believed that had Mr. Williamson's blind counsel not been ineffective and instead had admitted the videotaped confession by Ricky Simmons (not Glen Gore, the real killer), the jurors may have had a reasonable doubt.

Williamson v. State, 812 P.2d 384 (1991); *Williamson v. State*, 905 P.2d 1135 (1991); *Williamson v. State*, 852 P.2d 167 (1993); *Williamson v. Reynolds*, 904 F.Supp,. 1529 (E.D. Okla. 1995); *Williamson v. Ward*, 110 F.3d 1508 (1997).

2. Nicholas Yarris – Pennsylvania

The published opinions are not sufficiently detailed to determine precisely all claims that a federal court could consider under the SPA in Yarris' case. They do reveal that Yarris had exhausted at least some of his federal claims, thus Section 4 of the SPA would not bar a federal review. The claim that Yarris would have been executed had the SPA been in effect appears baseless.

The published opinions are sufficiently clear to determine that the Federal District Court could not have considered the claims the state court found time barred in Yarris' second PCR petition. Nor could the Federal District Court have considered the claims the Court found exhausted by virtue of Pennsylvania's fundamental error type review.

This would not necessarily been harmful to Yarris; instead it may well have benefited him. Had Yarris' federal attorneys focused on the question of guilt or innocence, rather than a multitude of other claims, the additional DNA testing might well have occurred prior to the summer of 2003. The record reveals that Yarris had federal counsel in 1995. *Commonwealth v. Yarris*, 671 A.2d 218, 220 n.7 (Pa. 1995). The record also reveals that DNA testing was "underway" in October 1998 during the state court proceedings. *Commonwealth v. Yarris*, 731 A.2d 581, 588 (Pa. 1995). Yet, the District Court did not even decide the procedural issues of the federal proceedings until August 2002. Another year elapsed before Yarris' federal attorneys announced the new DNA results. Dr. Edward Blake of Forensic Science Associates tested the gloves found in the victim's abandoned car, fingernail scrapings from the victim, and spermatozoa evidence from the victim's underpants. Significantly, the profiles obtained from the gloves and the spermatozoa evidence appeared to originate from the same person, not Yarris. Once these results were confirmed, the Commonwealth and Yarris filed a joint *state* PCR petition. Nothing in the reported decisions suggests that the federal court's role was essential. From the record, it is reasonable to infer because the focus was on claims other than the question of actual innocence, this lack of focus delayed the discovery of the DNA results by several years.

Mr. Scheck argues that if the SPA had been enforced Yarris would have been executed in 1997 or 1999. The record of the reported cases does not confirm that argument. First, we do not know all of the claims that had been included in his 1996 and 1999 federal habeas petitions. Logically, the 1999 habeas petition included the exhausted claims from 1996 petition that the District Court dismissed without prejudice as well as the newly exhausted claims. From Yarris' direct appeal decision, we know that he exhausted at least his IAC claims. Thus, the SPA would not have precluded him from pursuing at least those claims. Mr. Scheck mistakenly argues that Section 2 of the SPA would have required the dismissal of the entire 1996 habeas petition *with prejudice*. However, Section 2 only requires unexhausted "claims," be dismissed with prejudice. This provision is in accordance with one of the procedures the Supreme Court approved in *Rose v. Lundy*, 455 U.S. 509 (1982). Section 2 does change the result in the recent Supreme Court case, *Rhines v. Weber*, 125 S.Ct. 1528 (2005). That case permits a defendant to return to state court in limited circumstances to exhaust claims if a defendant meets certain conditions.

As discussed previously, contrary to Mr. Scheck's opinion, Section 4 of the SPA would not bar Yarris' exhausted claims in the 1999 habeas petition. Although we do not know all of the claims that were exhausted, we know that the IAC claims were exhausted.

It is true, that with fewer claims to decide in the 1999 habeas petition the District Court may have been able to move the case more expeditiously, but it is equally true with more focus, Yarris' counsel's pursuit of the DNA evidence might have been more expeditious.

If Section 9 of the SPA applied, the 1999 habeas petition would have been barred except for a claim of actual innocence, as Mr. Scheck asserts. Again, this may have focused attention on the DNA testing, rather than other claims.

What the record does make clear that once the DNA results were available, Yarris was able to go to *state* court and have his conviction vacated.

Commonwealth v. Yarris, 518 A.2d 261 (Pa. 1986); *Commonwealth v. Yarris*, 549 A.2d 513 (Pa. 1988); *Yarris v. Ryan*, 1989 WL 8073 (E.D. Pa. 1989); *Yarris v. Fulcomer*, 1989 WL 155897 (E.D. Pa. 1989); *Yarris v. Toal*, 1991 WL 83118 (E.D. Pa. 1991); *Commonwealth v. Yarris*, 671 A.2d 218 (Pa. 1995); *Commonwealth v. Yarris*, 731 A.2d 581 (Pa. 1999); *Yarris v. Horn*, 230 F.Supp. 2d 577 (E.D. Pa. 2002).

3. Eric Clemmons –Missouri

While he was serving a life sentence for the murder of Todd Weems, the State charged Eric Clemmons with the 1985 murder of a former cellmate, Henry Johnson. A jury convicted him of capital murder and he was sentenced to death. After years of litigation, in 1997, the Eighth Federal Circuit Court held that the State violated Clemmons' constitutional rights in the 1985 Johnson trial and ordered a new trial. The two bases of the Court's ruling were that the prosecution had not disclosed a statement taken shortly after the murder from an inmate who claimed that another inmate had committed the stabbing and that the trial court had violated Clemmons' confrontation rights when it admitted an important state's witness deposition although Clemmons had not personally consented to its admission. When the State retried Clemmons a decade and a half after the murder, in 2000, a jury did not believe beyond a reasonable doubt that Clemmons had murdered his former cell mate in 1985.

Mr. Scheck states that the State had suppressed the memorandum containing the inmate's statement. A review of the federal court decisions reveals no such finding. Instead, the federal appellate court suggested as an alternative theory that defense counsel could have negligently overlooked the memorandum in Johnson's inmate file or not recognized its importance. The federal district court suggested that inmates might have removed the document from Johnson file and provided it to Clemmons after his first trial. Nevertheless, the federal courts treated it as either a *Brady* violation or an IAC claim in addition to the Confrontation claim.

Mr. Scheck appears to be incorrect that under Section 4 of the SPA neither claim would have been subject to federal review. Ultimately, on a variety of questionable legal theories under pre-AEDPA law the Eighth Circuit concluded that Clemmons had fairly presented to the state courts both the *Brady* and Confrontation claims, and thus those claims were exhausted. *Clemmons v. Delo*, 124 F.3d 944, 948, 954 (8th Cir. 1997). For the Confrontation claim, the Court also concluded there was "cause" for any procedural default. *Id.* at 954; *see also Clemmons v. Delo*, 100 F.3d 1394 (8th Cir. 1996) (employing different legal theories and reaching different results). Under existing Supreme Court precedent—unrelated to either AEDPA or SPA—it is questionable whether the two claims were fairly presented to the state court, nevertheless Section 4 of the SPA would not change what occurred.

Mr. Scheck is correct that under Section 9 of the SPA (the opt-in provisions) the federal courts would be without jurisdiction to consider any of the claims because there was no clear and convincing evidence of actual innocence. Moreover, after reviewing all the published opinions in this case, there is no assurance that the first jury verdict was less reliable than the one 15 years later. In ordering a new trial, the Eighth Circuit stated "the State's case would have remained strong even with the new evidence." *Clemmons*, 124 F.3d at 951.

As the record makes clear, part of the problem with habeas litigation is the voluminous briefing where potentially meritorious issues are lost in the clutter. *See Clemmons v. Delo*, 1995 WL 691864 (W.D. Mo. 1995) at 5, 7. The clutter is probably caused in part by disagreement among attorneys and courts concerning what are significant issues. Here, the final Circuit Court opinion disagreed with its prior opinion and the federal district court's opinion.

Under the SPA federal review would have occurred much closer in time to the crime, so if a new trial was necessary witnesses would be available and memories more fresh. A review of the original state court opinion details the substantial evidence that existed at the time of the original trial. *State v. Clemmons*, 753 S.W.2d 901 (Mo. 1988).

State v. Clemmons, 682 S.W.2d 843 (Mo. App. 1984); *State v. Clemmons*, 753 S.W.2d 901 (Mo. 1984); *Clemmons v. Missouri*, 785 S.W.2d 524 (Mo. 1990); *Clemmons v. State*, 795 S.W.2d 414 (Mo. App. 1990); *Clemmons v. Delo*, 1995 WL 691864 (W.D. Mo. 1995); *Clemmons v. Delo*, 100 F.3d 1394 (8th Cir. 1996); *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997); *Bowersox v. Clemmons*, 523 U.S. 1088 (1998); *Clemmons v. Delo*, 177 F.3d 680 (8th Cir. 1999).

4. Ernest Willis—Texas

Section 4 of the SPA would not change the result in this case. There was no question of exhaustion of the constitutional claims. Because this was a post-AEDPA case, the District Court appropriately relied on the factual record before the state court in reaching its legal conclusions. It disagreed with the Texas appellate court only in its legal conclusions. More important, the SPA would have changed the Fifth Circuit precedent and permitted a finding on the claim of actual innocence.

Mr. Scheck analyzes the case under Section 9 (opt-in provisions) of the SPA, although Texas has not opted in to the enhanced qualification of counsel provisions. Willis filed his state PCR proceeding in 1991, but a hearing was not held for almost a decade. Perhaps with the enhanced qualifications of attorneys in state court the theory that won Willis his release and a hearing would have occurred in less than a decade.

Assuming Section 9 applied, Mr. Scheck contends because Willis counsel were diligent in state court in pursuing their claim of actual innocence, it would not meet the exception for actual innocence under Section 9. He is mistaken. In state and federal court, Willis' actual innocence claim was that another death row inmate, David Long, had committed the arson. In the record, there is no showing that Willis' counsel were not diligent in discovering this claim and presenting it in state court. SPA § 2264(b)(2) does not prevent a federal court from reviewing such a claim under these circumstances because both the due diligence and actual innocence claim are present.

Moreover, the record indicates that the second actual innocence claim—that the fire was accidental—might have been discovered with due diligence long before. The new experts opined that the trial experts had relied on what was an "outdated" understanding of the physics of fire.

Mr. Scheck suggests that the federal courts could not have decided "in all likelihood" Willis' forced medication constitutional claim under Section 4 because the Texas appellate court rejected the claim after Willis failed to object. However, the District Court found that the state appellate court's reasoning was "contrary to clearly established federal law regarding waiver of constitutional rights." *Willis v. Cockrell*, 2004 WL 1812698 (W.D. Tex. 2004), at 14. Thus, it is not clear that the SPA would have barred this claim. In any event, the federal courts clearly had jurisdiction under Section 4 of the SPA to review the clearly exhausted claims.

Mr. Scheck argues that Section 6 would have precluded District Court review of the *Brady* claim because the claim concerned sentencing and the Texas appellate court found it not "prejudicial." Generally, under Section 6, a federal court does not have jurisdiction to review a sentencing decision that the state court found to be harmless or not prejudicial. The Texas appellate court's decision is not published. According to the District Court's decision, the Texas appellate court found that the suppressed report "did not meet the standard of favorability or materiality." *Id.* at 19; *see also id.* at 21. This express finding does involve Section 6. Moreover, even if Section 6 had applied, the writ still would have issued based on the IAC claims.

Willis v. State, 785 S.W.2d 378 (Tex. Crim. App. 1990); *Willis v. Cockrell*, 2004 WL 1812698 (W.D. Tex. 2004).

5. Ricardo Aldape Guerra—Texas

Assuming that Texas would qualify for opt-in status, Mr. Scheck argues that under Section 9 the federal courts would lack jurisdiction to hear this case. Even assuming Texas qualified for Section 9 treatment, if Guerra's state PCR attorneys were diligent, as Mr. Scheck states they were, then under § 2264(b)(A) they would meet the "due diligence" test. Because the essence of the federal claims were based on misidentification—that Guerra's passenger was the shooter—actual innocence would be the claim. Because Guerra did not get a hearing in state court through no fault of his own, under 28 U.S.C. 2254(e)(2), he would be entitled to the evidentiary hearing that he received in federal court.

Under Section 4, nothing in the record suggests that the SPA would have precluded the federal proceedings. The only thing that may have changed the result in this case is if Texas had charged Guerra as an accomplice rather than the principal. There is no dispute that when the officer stopped the car he was driving, Guerra was armed. There is no question that after the officer was shot and killed, Guerra fired shots with his .45 caliber pistol as he and his passenger fled the scene. Nor is it disputed that five days before the murder of the police officer, Guerra, his passenger, and a third individual robbed a gun store gaining possession of a multitude of deadly weapons.

Guerra v. State, 771 S.W.2d 453 (Tex. Crim. App. 1988); *Guerra v. Collins*, 916 F.Supp. 620 (S.D. Texas 1995); *Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996).

6. Curtis Kyles—Louisiana

Mr. Scheck does not argue that Section 4 of the SPA would change the result in this case. It would not. Kyles had properly exhausted his federal claims in state court. Rather, once again he focuses on the opt-in provisions under Section 9 and speculates what might have happened if that section were applicable.

Moreover, even assuming Louisiana had opted-in under Section 9, it appears that Mr. Scheck again misreads SPA's proposed § 2264(b)(2). There is no suggestion from the published record that there was a lack of diligence by defense counsel discovering the *Brady* material in state court. Under § 2264(b)(2) "diligence" is the operative word, not what court it occurs in. Thus, like under § 2254(e)(1), if defense counsel is diligent in state court he is entitled to a federal evidentiary hearing. *See Williams v. Taylor*, 529 U.S. 420, 432 (2000). Perhaps, a closer question is whether the cumulative *Brady* material was "clear and convincing evidence that no reasonable fact finder" would have found Kyles guilty, particularly in the light of the subsequent trials. Even with the new information, no jury ever acquitted him. However, because identity was the only issue in the case, even under Section 9 probably a federal reviewing court would find the evidence sufficiently "clear and convincing" to address the claim.

However, under the historical facts this speculation is immaterial because Louisiana never opted-in to the accelerated provisions of the AEDPA, and under Section 4 the result would be unchanged.

Louisiana retried Kyles following the United States Supreme Court's decision for the 1984 murder of a sixty-year-old woman during a car jacking. After his fifth trial resulted in a hung jury in the late 1990s, Louisiana elected not to retry Kyles a sixth time.

State v. Kyles, 513 So.2d 265 (La. 1987); *Kyles v. Whitley*, 1992 WL 74590 (E.D. La. 1992); *Kyles v. Whitley*, 1992 WL 125350 (E.D. La. 1992); *Kyles v. Whitley*, 5 F.3d 806 (5th Cir. 1993); *Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Kyles*, 706 So.2d 611 (La. 1998).

7. Federico Martinez-Macias—Texas

Again, Mr. Scheck does not argue that Section 4 of the SPA would change the result in this case. It would not. The IAC claims were fairly presented in state court and because there had been no state court evidentiary hearing on them, under AEDPA's § 2254(e)(2) Macias would have been entitled to a federal evidentiary hearing.

Even if Texas had opted in, it is not clear that under Section 9 of the SPA the case would not be entitled to federal review. From the published record, there was no claim of lack of diligence in state court, where counsel raised the IAC claims. And depending on the credibility and corroboration of the alibi testimony, there may well have been a claim of actual innocence.

Macias v. State, 733 S.W.2d 192 (Tex. Crim. App. 1987); *Martinez-Macias v. Collins*, 810 F.Supp. 782 (W.D. Texas 1991); *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992).

B. SPA and Supreme Court Cases

Chief Justice John Marshall, speaking for the Supreme Court, held that while courts could resort to the common law to understand "the meaning of the term *habeas corpus*," only Congress could empower a federal court to award the writ. *Ex Parte Bollman*, 8 U.S. 75, 93—94 (1807). For much of our history, "a prisoner seeking a writ of habeas corpus could only challenge the jurisdiction of the court that had rendered the judgment." *Wright v. West*, 505 U.S. 277, 285 (1992). It was only after the Civil War that Congress empowered the federal courts to grant writs of habeas corpus in cases of state-court convictions. Judiciary Act of Feb. 5, 1867, ch. 28, 14 Stat. 385—86. Thus for many of the listed Supreme Court cases, the Court is simply interpreting the power Congress has given the federal courts through various statutory provisions. In other cases, where Congress has not spoken, the Court is reaching its own conclusion given the framework Congress has provided. To the extent the SPA changes any of the prior Supreme Court holdings, it is simply Congress changing the statutory framework after

considering the appropriate public policy. There is nothing novel or outrageous about such a procedure. Congress' changes in the statutory law always have implications for the Supreme Court's interpretation of that law.

Moreover, Mr. Scheck's explanation of how the SPA sections relate to prior Supreme Court cases does not provide sufficient context to understand the underlying policy considerations. For example, additional context is need to understand Mr. Scheck's review of SPA § 2 and the Supreme Court cases of *Rhines v. Weber*, 125 S.Ct. 1528 (2005), and *Rose v. Lundy*, 455 U.S. 509 (1982).

In *Lundy*, the Court recognized that Congress required as a matter of comity that state prisoners must first present their federal claims of error to the state courts, so those courts would have the first opportunity to correct them. In deciding the case, the Court turned to "the habeas statute, its legislative history, and the policies underlying the exhaustion doctrine." *Id.* 455 U.S. at 515. The Court noted that "[t]he facts of the present case underscore the need for a rule encouraging exhaustion of all federal claims." *Id.* 455 U.S. at 519. "[S]trict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." *Id.* 455 U.S. at 520. The Court held that a "district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Id.* 455 U.S. at 522. After *Lundy*, lower federal courts would dismiss the petition *without prejudice* so the prisoner could return to state court to fully exhaust his habeas petition. That procedure resulted in delay.

With the enactment of the AEDPA in 1996, Congress "dramatically altered the landscape for federal habeas corpus petitions." *Rhines*, 125 S.Ct. at 1533. While the AEDPA preserved *Lundy*'s total exhaustion requirement, Congress enacted a 1-year statute of limitations. In *Rhines*, the Supreme Court addressed the interplay between these two provisions. It concluded that Congress did not deprive district courts of the authority to exercise discretion and grant stays in order for a prisoner to return to state court to exhaust any unexhausted claims, while the district court held his timely filed habeas petition in abeyance. However, the Court held that the stay and abeyance procedure was limited by the AEDPA to the extent "good cause" must excuse the prisoner's failure to exhaust his claims within the statute of limitations period, the procedure could not be used for plainly meritless claims, and where appropriate the stay is limited by the timeliness concerns reflected in the AEDPA. *Id.* 125 S.Ct. at 1535.

Enactment of the SPA would simply affirm the policy that the 1-year statute of limitations, with the statutory tolling provision for state post-conviction relief proceedings, is an adequate amount of time in which to exhaust any bonafide federal claim. The federal claims presented in the direct appeal would have been exhausted before the statute began to run. The statute is tolled while any federal claim is being exhausted in the state post-conviction relief proceeding. Little time is necessary to take the prisoner's state direct appeal brief and his petition for review brief in his post-conviction proceeding and meld it into a federal habeas petition. Congress believed when it enacted the 1-year statute of limitations that it provided an adequate time period. The SPA simply affirms that believe.

2. Please review the four cases cited by Seth P. Waxman in his testimony before the Committee on the Judiciary and discuss whether you agree with his assessment of how those cases would have come out under the Streamlined Procedures Act of 2005, S. 1088.

***Miller-El v. Dretke*, 545 U.S.___, 125 S.Ct. 2317 (2005)**

In late 1985, Miller-El and his accomplices bound and gagged two hotel employees in the course of robbing a Holiday Inn in Dallas, Texas. Miller-El then shot Donald Hall in the back while Hall was lying face down on the floor, rendering him a paraplegic. Miller-El also shot Doug Walker in the back as he lay on the floor, killing him. A jury composed of seven white females, two white males, a black male, a Filipino male, and a Hispanic male convicted Miller-El and sentenced him to death.

While the Miller-El's case was on direct appeal, the United States Supreme Court overruled *Swain v. Alabama*, 380 U.S. 202 (1965) in *Batson v. Kentucky*, 476 U.S. 79 (1986) igniting in Miller-El's case nearly twenty-years of litigation in the state and federal courts.

In 2005, a majority of the Supreme Court concluded that as a matter of fact the prosecutors at Miller-El's trial improperly excluded some potential black jurors using peremptory challenges. The Court remanded the case for entry of judgment for Miller-El together with orders of appropriate relief. The Supreme Court did not state that the jury that tried Miller-El was unfair or prejudiced or that Miller-El had any claim of innocence. Nevertheless, Texas now has the choice of attempting to retry Miller-El or releasing him.

Under the opt-in provisions of Section 9 of the SPA, Miller-El would not have been entitled to relief unless a federal court interpreted § 2264(b)(1) (change in the law made applicable by the Supreme Court to cases on collateral review) as applying to this case. As a matter of law, the Supreme Court has held that new rules of constitutional law are retroactive to cases on direct review. Under § 2264(b)(2), Miller-El would not be entitled to relief because there was no claim of actual innocence.

Nothing in Mr. Waxman's statement suggests that Miller-El would have been prevented in raising his *Batson* claim under Section 4 of S.1088. Section 4 applies to all capital and non-capital cases, except where a jurisdiction has opted-in under Section 9.

Additionally, Mr. Waxman is mistaken in one part of his statement. Because neither party objected, the Supreme Court decided the case on evidence never submitted or resolved in state court. *Miller-El v. Dretke*, at footnote 15. Thus, the Supreme Court did not find that the state-court fact-finding was unreasonable.

While the Supreme Court decided the case 6 to 3, Mr. Justice Breyer noted in his concurring opinion that "Miller-El's challenge has resulted in 17 years of largely unsuccessful and protracted litigation—including 8 different judicial proceedings and 8 different judicial opinions, and involving 23 judges, of whom 6 found the *Batson* standard violated and 16 the contrary." *Miller-El*, ¶ I of Justice Breyer's concurrence. About half of this litigation occurred

after the AEDPA was enacted in 1996. This case speaks volumes for the need of finality in the criminal justice system.

***Banks v. Dretke*, 540 U.S. 668 (2004).**

On April 14, 1980, police found the corpse of 16-year-old Richard Whitehead near Texarkana, Texas. Whitehead had been shot three times. Two witnesses had seen Whitehead in the company of 21-year-old Delma Banks on the evening of April 11. Eventually, the police recovered the murder weapon from Charles Cook. Cook told them that Banks had left the gun with him. At trial, Cook testified that Banks had arrived in Dallas in a green Mustang on April 12 and stayed until April 14. Whitehead had a green Mustang. According to Cook, Banks confessed to killing a "white boy for the hell of it" and taking his car. Cook testified that Banks left Dallas by bus and Cook abandoned the Mustang in West Dallas.

Contrary to the truth, on cross-examination in the guilt phase Cook claimed that he had not talked to anyone about his testimony. Another witness, Robert Farr, who corroborated parts of Cook's account, lied in the guilt phase about taking any money from police officers and in the sentencing phase about not being a confidential informant. The prosecutors failed to correct these lies.

In his third state post-conviction motion filed in 1992, Banks raised the *Brady* claims ultimately decided by the Supreme Court. When he did not receive relief in state court, in March 1996, Banks filed his federal petition for a writ of habeas corpus reasserting his *Brady* claims. In February 1999, Banks proffered affidavits from both Farr and Cook supporting his *Brady* claims.

Mr. Waxman is correct that if Texas had supplied counsel in state post-conviction proceedings under a system satisfactory to the Attorney General, Section 9 of the SPA would have precluded review because there is no claim of actual innocence.

Based on the Supreme Court's opinion, however, Mr. Waxman appears to be mistaken about whether Sections 2 and 4 of the SPA would have prevented federal court review of the *Brady* claims. Banks exhausted this claim in state court. The Supreme Court expressly stated "Banks' third state postconviction motion, filed January 13, 1992, presented questions later advanced in federal court and reiterated in the petition now before us." *Banks*, 540 U.S. at 682. Thus, Banks sufficiently exhausted his *Brady* claims to permit federal court review. Under these circumstances, the SPA would not have changed the result.

***Wiggins v. Smith*, 539 U.S. 510 (2003)**

In September 1988, police found 77-year-old Florence Lacs dead in her bathtub. Her Woodlawn, Maryland, apartment had been ransacked. Kevin Wiggins was eventually arrested, convicted of her murder, and sentenced to death. This case does not question his guilt, only whether his two public defenders rendered ineffective assistance in their investigation of mitigating evidence. The Supreme Court concluded they had. The Court reasoned that "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the

scale, there is a reasonable probability that at least one juror would have struck a difference balance." *Wiggins*, 539 U.S. at 537.

Mr. Waxman correctly noted that if Maryland had opted-in under Section 9 of the SPA it would have prevented this claim because there was no actual innocence claim of the murder, only the sentence was at issue. However, Mr. Waxman does not contend that the SPA would have prevented federal review of this case. Wiggins had exhausted his ineffective assistance of counsel claim in state court. The state court had found that counsel was not constitutionally deficient, and thus the deficient prong of the ineffective assistance of counsel had been fully exhausted under Section 4 and Section 6 would not apply. *Id.* at 517—18.

***Lee v. Kemna*, 534 U.S. 362 (2002)**

In August 1992, Reginald Rhodes shot Steven Shelby to death on a public street. Rhodes then jumped into a waiting truck that sped away. Rhodes later pled guilty. Remon Lee, the alleged getaway driver of the truck, was tried for first-degree murder and armed criminal action in Kansas City, Missouri.

Lee's defense at his 1994 trial was alibi. Lee asserted he was in Ventura, California, from July through October 1992. On the final day of trial, his three alibi witnesses left the courthouse. The witnesses were his sister, mother, and stepfather, Gladys and James Edwards and Laura Lee. When Lee could not find his witnesses, he asked for a short continuance to find them. Because his relatives had some ministering to do in Kansas City, he did not believe they had returned to California. Believing that the witnesses had abandoned the defendant, the trial court denied the continuance.

In his post-conviction proceeding, Lee asserted that the three witnesses had left the courthouse because "an unknown person," whom he later identified as an employee of the prosecutor's office, had told them "they were not needed to testify." *Lee*, 534 U.S. at 371. The trial court denied Lee's motion, finding the improper denial of a motion to continue was a trial error that must be raised on direct appeal, not in a collateral challenge.

In the direct appeal that was consolidated with his appeal from the post-conviction proceeding, the state appellate court found that his motion to continue was infirm for a variety of state-law reasons.

In his 1998 federal habeas proceeding, Lee appended affidavits from his three witnesses; each swore that they had left the court because a "court officer" told them their testimony would not be needed. The District Court found that these affidavits were not cognizable in federal court because they had not been offered in state court. The Eighth Circuit found Lee's claim procedurally defaulted because his motion to continue did not comply with state law.

A majority of the Supreme Court concluded that this case fit "within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim." *Id.* at 381. The trial judge said he could not continue the trial because the next day he had to be with his daughter in the hospital and the following business day he had another trial scheduled.

Id. The dissent pointed out the "strong interest" States have in ensuring that continuances are granted only when necessary and how delay can harm the administration of justice. *Id.* at 392.

Mr. Waxman is correct that Section 4 of the SPA would preclude review in federal court of this case and other cases within this small category of cases. If the State ruling were ambiguous, then the federal court would have to decide the procedurally barred issue based on examination of the full state-court record. § 2254(4). It is certainly an appropriate public policy question for Congress to balance whether this small category of cases warrant federal review absent clear evidence of actual innocence.

On remand from the Supreme Court, the District Court found "doubtful that an alibi for late August, 1992, had been particularly well established" by the testimony. *Lee v. Kemna*, 2004WL157555 (W.D. Mo. 2004) at 5. "I continue to believe that it is unlikely that the three family witnesses could have persuaded a jury that an alibi was sound in this case." *Id.* But because the court's skepticism did not amount to confidence of a "mere possibility" that a jury would accept the alibi evidence, the District Court concluded the due process violation must be deemed prejudicial and issued the Writ. *Id.*

SURVEY OF ARIZONA CAPITAL CASES

2005

In support of

Responses to Questions from Senate Judiciary Committee Members Regarding SB 1088

Capital Litigation Section
Arizona Attorney General's Office

August 19, 2005

SURVEY OF ARIZONA'S CAPITAL CASES

2005

IN RESPONSE TO MR. WAXMAN'S SUGGESTION FOR ADDITIONAL STUDY

Mr. Waxman suggests that Congress should study the problem of delay in federal habeas proceedings rather than take steps to correct it. The attached statistical information based on Arizona's current capital cases in federal court, and anecdotal information derived from Arizona's current and former capital cases substantiate the significant problem of delay and lack of finality for victims. The AEDPA has not solved this problem.

Arizona's Capital Case Commission studied all of Arizona's capital cases from 1974 through July 1, 2000. During that period, 14 capital cases completed the federal habeas review process. The median case took 8.4 years to complete (5.5 years in District Court and 2.8 in the Ninth Circuit). No one has been executed in Arizona since 2000. Of the 51 cases pending in the federal courts prior to 2000, all remain pending today.

There are 76 Arizona capital cases pending in federal court. This represents over two thirds of Arizona's pending capital cases. Although some cases were filed within the last few months, over half of the cases have been pending in federal court five years or more. Of those, thirteen cases have been pending for seven years. Ten cases have been pending for eight years. Five cases have been pending for more than fifteen years. The attached charts display how long Arizona's capital cases have been pending in federal court, the percentage of capital cases in federal and state court, and the number of cases in Federal District Court and the Ninth Circuit. (Exhibit A.) An Excel spreadsheet, also part of Exhibit A, lists each case in federal court and the time it has been pending in either the Federal District Court or the Ninth Circuit. The information on the spread sheet may be verified using the Federal Court dockets on PACER.

The following two cases are examples of cases that have completed their first full round of federal review and are starting through the process again. Had Section 6 (sentencing provision) of the Streamlined Procedures Act of 2005 been in place, both these cases would have been resolved more than a decade ago. Neither case presents a question of the defendant's guilt; the Ninth Circuit sent the cases back only because of issues related to the defendants' death sentences. The SPA would have brought finality for the surviving victims and saved the taxpayers hundreds of thousands of dollars. Unfortunately, although the defendants have again been sentenced to death, the litigation in these cases is not over.

Joseph Clarence Smith

On January 1, 1976, Sandy Spencer's nude body was discovered in the desert outside Phoenix. A month later, Neva Lee's nude body was found in a different desert location. Joseph Clarence Smith had suffocated both teenagers by forcing dirt into their mouths, which were taped shut. Smith bound both teenagers and stabbed them multiple times.

Smith was on probation from a rape conviction at the time of the murders. He eventually confessed to the Lee murder after assaulting an undercover female officer. Following his jury conviction for the Lee murder, Smith pled guilty to the Spencer murder. While Smith's case was pending direct appeal, the United States Supreme Court broadened the scope of mitigation in a capital sentencing proceeding, necessitating that Smith be resentenced. In 1979, the re-sentencing judge determined Smith had three prior convictions for rape, crimes for which life imprisonment was possible; each was an aggravating circumstance pursuant to A.R.S. § 13-703(F)(1). Additionally, the court found that both murders were especially heinous, cruel, or depraved pursuant to A.R.S. §13-703(F)(6). At the time of her death, Neva Lee was 14 years old. Among her wounds was an inch-long stab wound penetrating one inch at the left side of the vulva just at the entrance into her vagina. Eighteen-year-old Sandy Spencer had sustained 19 to 20 stab wounds in the groin and pelvic areas. Among other trauma, she had a 2¼-inch sewing needle embedded in her left breast and chest wall. The trial court considered mental health evidence presented through expert witnesses but found that it was not sufficiently substantial to warrant leniency.

Smith filed a petition for federal habeas relief on October 3, 1991. Over six years later, on January 21, 1997, the District Court granted summary judgment for the State. The following April, Smith filed his notice of appeal. Over three years later, the Ninth Circuit—in a 2 to 1 panel decision—issued its mandate based on a finding that Smith's counsel had been ineffective at Smith's re-sentencing. The Ninth Circuit granted a writ of habeas corpus releasing Smith from his death sentences.

While Smith was pending a third sentencing proceeding, the United States Supreme Court overruled it prior precedent and held that jurors, not judges, had to find the aggravating circumstances that made a defendant eligible for the death penalty. After years were spent re-investigating this quarter-of-a-century old case, jurors re-sentenced Smith to death for a third time in May 2004. The case is currently pending briefing and completion of the two-year trial-court record in the Arizona Supreme Court. Assuming the Arizona Supreme Court affirms his two death sentences, Smith will then seek state post-conviction relief and then if that fails, return to federal court.

State v. Smith, 123 Ariz. 231, 599 P.2d 187 (1979) (direct appeal); *State v. Smith*, 131 Ariz. 29, 638 P.2d 696 (1981) (appeal following re-sentencing); *Smith v. Lewis*, CV 91—01577-PGR (District Court case number); *Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999) (Ninth Circuit Opinion).

James Granvil Wallace

On February 2, 1984, James Granvil Wallace telephoned the Tucson Arizona Police Department to report that he had killed three people—his girl-friend Susan Insalaco and her two children, Anna and Gabe, ages 16 and 12.

Wallace told police that because of his use of alcohol and drugs, Susan wanted him to move out. When Anna arrived home, Wallace attacked her from behind with a baseball bat, striking her numerous times, eventually breaking the bat. When Anna still appeared to be alive, Wallace forced a portion of the broken bat through her throat until it hit the floor. He then hid Anna's body in Susan's bathroom.

When Gabe returned from school 15 minutes later, Wallace followed him into the bedroom and repeatedly struck him over the head with a pipe wrench, fracturing his skull in several places. Police found Gabe's brain matter splattered on the floor.

Wallace decided to kill Susan with the pipe wrench he had used on Gabe instead of a gun, because the gun would make too much noise. When Susan returned from work and was putting away the groceries, Wallace struck her on the side of the head and kept striking her as she collapsed on the floor.

At this point, Wallace decided he needed a drink. He took money from Susan's wallet and drove her truck to a liquor store. He spent the night at a friend's house, where he played chess. The next day Wallace told his friend what happened and called the police.

Wallace pled guilty to three counts of first-degree murder and two counts of armed robbery. The trial judge sentenced him to death on each of the murder counts. On direct appeal, the Arizona Supreme Court set aside Wallace's death sentence for Susan's murder and ordered a re-sentencing, but affirmed the death sentences for the murders of Anna and Gabe. On re-sentencing, the trial court re-sentenced Wallace to death for Susan's murder.

On June 5, 1991, Wallace filed a petition for a federal writ of habeas corpus. Nearly six years later, on January 27, 1997, the District Court denied Wallace's petition with prejudice. In May 1997, Wallace filed a notice of appeal. In September 1999, the Ninth Circuit issued its mandate based on a finding that sentencing counsel had been ineffective and ordered an evidentiary hearing. Three years later, the District Court granted Wallace's habeas petition and set aside his three death sentences, finding his attorneys had been ineffective at his sentencing and re-sentencing.

On April 7, 2005, jurors re-sentenced Wallace to death for each of the three murders. Now the process, which originally began in the 1980s challenging Wallace's three death sentences, begins anew. Although there is no question concerning his guilt, review of the jurors' decision to impose the death penalty will be reviewed for years by both the state and federal courts.

State v. Wallace, 151 Ariz. 362, 728 P.2d 232 (1986) (direct appeal); *State v. Wallace*, 160 Ariz. 424, 773 P.2d 983 (1989) (appeal after re-sentencing); *Wallace v. Lewis*, CV 91-00315-WDB (District Court case number); *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999) (Ninth Circuit opinion).

In addition to Exhibit A, which contains the statistical information about Arizona's current capital cases pending in federal court, Exhibit B provides some additional information in outline form regarding some of Arizona's current capital cases. Exhibit C provides a detailed narrative about the federal court litigation in two of the cases.

#122308

EXHIBIT A

See two PDF documents attached to the email: (1) charts, and (2) inmate data sheet

EXHIBIT B

DEFENDANT'S NAME: ROBERT HENRY MOORMANN

CASE NUMBER: Circuit No. 00-99015

CITE AND SHORT FACTUAL SUMMARY:

State v. Moorman [sic], 154 Ariz. 578, 744 P.2d 679 (1987).

While serving a sentence of 9 years to life at the Arizona State Prison in Florence, Moormann was given a 72-hour compassionate furlough to visit with his mother who had adopted Moormann when he was a baby. The two stayed at the Blue Mist Motel in Florence. On January 13, 1984, Moormann bound and gagged his mother, then strangled and stabbed her to death. Moormann chopped the body into many parts, flushed his mother's fingertips down the toilet and disposed of her head and other body parts in dumpsters throughout Florence. Within hours however, his crime was discovered, and he confessed. A phony Codicil to his mother's Will was found in his prison cell leaving his mother's money to him.

DATE ENTERED FEDERAL DISTRICT COURT: 07/11/1991

TIME PENDING IN DISTRICT COURT: 9 yrs, 3 months

INITIAL PETITION
- **PAGE LENGTH:** 3
- **CLAIMS RAISED:** 3

AMENDED PETITION
- **DATE:** 09/07/1993
- **PAGE LENGTH:** 144
- **TOTAL CLAIMS:** 34

2ND AMENDED PETITION
- **DATE:** 09/30/1996
- **PAGE LENGTH:** 83
- **TOTAL CLAIMS:** 18

DATE ENTERED NINTH CIRCUIT: 10/30/2000

TIME PENDING IN NINTH CIRCUIT: 4 yrs, 10 months (still pending)

DEFENDANT'S NAME: RICHARD MICHAEL ROSSI

CASE NUMBER: Circuit No. 01-99010

CITE AND SHORT FACTUAL SUMMARY:

State v. Rossi, 146 Ariz. 359, 706 P.2d 371 (1985).
State v. Rossi, 154 Ariz. 245, 741 P.2d 1223 (1987).
State v. Rossi, 171 Ariz. 276, 830 P.2d 797 (1992).

Around 12:30 p.m. on August 29, 1983, Rossi went to the Scottsdale home of Harold August, supposedly to sell a typewriter. Instead, he shot Mr. August three times. After the first two shots, Mr. August said, "You've got my money and you've shot me-what more do you want?" Rossi then shot August in the mouth, killing him. A neighbor heard the shots and walked into the August home. Rossi hit her over the head with a blackjack and shot her twice in the chest. Rossi used exploding bullets on both victims, but she survived.

DATE ENTERED FEDERAL DISTRICT COURT: 04/23/1996

TIME PENDING IN DISTRICT COURT: 5 yrs, 3 months

AMENDED PETITION

DATE:	03/03/1997
PAGE LENGTH:	130
NEW CLAIMS	36

DATE ENTERED NINTH CIRCUIT: 07/13/2001

TIME PENDING IN NINTH CIRCUIT: 4 yrs, 1 month (still pending)

DEFENDANT'S NAME: RONALD SCHACKART

CASE NUMBER: Circuit Court No. 96-15967

CITE AND FACTUAL SUMMARY:

State v. Schackart, 175 Ariz. 494, 858 P.2d 639 (1993).
State v. Schackart, 190 Ariz. 238, 947 P.2d 315 (1997).

Schackart and Charla Regan, who had known each other since high school, continued to be friends at the University of Arizona. On March 8, 1984, Schackart told Regan he needed a place to stay since his parents had kicked him out of their house. He also told her he needed to talk to her about his wife's filing rape charges against him. They went to a Tucson Holiday Inn where Schackart raped Charla at gunpoint, hit her in the face with the gun, strangled her to death, and stuffed a large sock into her mouth. He later reported the killing to the police and claimed he had not intended to kill Charla.

DATE ENTERED FEDERAL DISTRICT COURT: 05/30/2003 (still pending)

AMENDED PETITION
DATE: 03/3/2004
PAGE LENGTH: 39
TOTAL CLAIMS: 16

DEFENDANT'S NAME: RONALD TURNEY WILLIAMS

CASE NUMBER: Circuit No. 01-99015

CITE AND FACTUAL SUMMARY:

State v. Williams (Ronald), 166 Ariz. 132, 800 P.2d 1240 (1987).

While serving a life-sentence in West Virginia for first-degree murder of a police officer, in 1979 Williams escaped from prison. In the escape, another officer was shot and killed. Later Williams was convicted of first-degree murder for that killing. While on the run, on the morning of March 12, 1981, Williams kicked in the front door of a home in Scottsdale and began to burglarize it. While Williams was inside, a neighbor, John Bunchek, came to the home to investigate. Williams shot Bunchek in the chest, killing him. Williams left Arizona that same day without telling his roommates. Three months later, FBI agents arrested Williams in New York City after a shoot-out with him. A gun taken from Williams at his arrest had fired the bullet that killed Mr. Bunchek. Williams had purchased the gun before the Scottsdale burglary.

DATE ENTERED FEDERAL DISTRICT COURT: 08/15/1995

TIME PENDING IN DISTRICT COURT: 6 yrs

INITIAL PETITION
PAGE LENGTH: 3
CLAIMS RAISED: 4

AMENDED PETITION
DATE: 06/24/1996
PAGE LENGTH: 91
TOTAL CLAIMS: 35

DATE ENTERED NINTH CIRCUIT: 08/21/01

TIME PENDING IN NINTH CIRCUIT: 4 yrs (still pending)

DEFENDANT'S NAME: DONALD EDWARD BEATY

CASE NUMBER: Circuit Court No. 00-99007

CITE AND FACTUAL SUMMARY:

State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988).

On the evening of May 9, 1984, Christy Ann Fornoff, a 13-year-old news carrier, was collecting from her customers at the Rockpoint Apartments in Tempe, Arizona. Beaty, who was the apartment custodian, abducted Christy sexually assaulted and then suffocated her to death in his apartment. Beaty kept the body in his apartment until the morning of May 11, 1984, when he placed it behind the apartment complex's trash dumpster. Later that morning, Beaty reported finding Christy's body. Physical evidence from Beaty's apartment linked Beaty to the murder. After a group therapy session in the jail following his arrest, Beaty confessed to a psychiatrist.

DATE ENTERED FEDERAL DISTRICT COURT: 11/06/1992

TIME PENDING IN DISTRICT COURT: 10 yrs, 5 months

INITIAL PETITION
- **PAGE LENGTH:** 16
- **CLAIMS RAISED:** 21

AMENDED PETITION
- **DATE:** 10/13/1993
- **PAGE LENGTH:** 131
- **TOTAL CLAIMS:** 32

DATE ENTERED NINTH CIRCUIT: 4/6/2000

TIME PENDING IN NINTH CIRCUIT: 2 years, 4 months (will be returning soon)

DEFENDANT'S NAME: ROBERT CHARLES COMER

CASE NUMBER: Circuit No. 98-99003

CITE AND FACTUAL SUMMARY:

State v. Comer, 165 Ariz. 413, 799 P.2d 333 (1990).

On February 23, 1987, Comer and his girlfriend, Juneva Willis, were at a campground near Apache Lake, Arizona. They invited Larry Pritchard, from the adjoining campsite, to have dinner and drinks with them. Around 9:00 p.m., after telling Willis what he was going to do, Comer shot Pritchard in the head, killing him. He and Willis then stole Pritchard's belongings. Around 11:00 p.m., Comer and Willis went to a campsite occupied by Richard Brough and his girlfriend. Comer stole their property, hogtied Brough to a car fender, and then raped his girlfriend in front of Brough. Comer and Willis then left the area, taking the girlfriend with them, but leaving Brough behind. Brough's girlfriend escaped the next morning and ran for 23 hours before finding help. Willis pled guilty to kidnapping and testified against Comer.

TOTAL TIME PENDING IN DISTRICT COURT: 5 yrs, 8 months

Entered Dist. Court (1st time)	07/19/1994
Sent to 9th Cir (1st time)	03/03/1998
Back to Dist. Court (2nd time)	06/09/2000
Sent to 9th Cir. (2nd time)	06/24/2002

TOTAL DAYS PENDING IN 9TH CIRCUIT: 5 yrs, 5 months (still pending)

OPENING BRIEF

DATE:	03/16/1995
PAGE LENGTH:	121
TOTAL CLAIMS:	20

DEFENDANT'S NAME: Daniel W. Cook

CASE NUMBER: CV-97-146-PHX-SMM

CITE AND FACTUAL SUMMARY:

State v. Cook, 170 Ariz. 40, 821 P.2d 731 (1991).

Cook, John Matzke, and Carlos Froyan Cruz-Ramos worked at a restaurant in Lake Havasu City and shared an apartment. On July 19, 1987, Cook stole some money from Cruz-Ramos. When Cruz-Ramos began searching the apartment for the money, Cook and Matzke tied Cruz-Ramos to a chair and began beating him with their fists and a metal pipe. Cook also cut Cruz-Ramos with a knife, sodomized him, and burned his genitals with cigarettes. After several hours of this torture, Matzke and Cook crushed Cruz-Ramos' throat with the pipe. When Kevin Swaney, another co-worker, arrived at the apartment, Cook forced him upstairs and showed him Cruz-Ramos' body. Cook and Matzke then tied Swaney to a chair. Matzke went to sleep while Cook sodomized Swaney. When Cook was finished, he woke Matzke and the two men strangled Swaney to death with a bed sheet. Matzke pled guilty to second-degree murder and testified against Cook.

DATE ENTERED FEDERAL DISTRICT COURT: 01/24/ 1997

PENDING IN DISTRICT COURT: 8 years, 7 months (still pending)

INITIAL PETITION
PAGE LENGTH: 3
CLAIMS RAISED: 2

AMENDED PETITION
DATE: September 25, 1997
PAGE LENGTH: 55
TOTAL CLAIMS: 16

DEFENDANT'S NAME: Murray Hooper

CASE NUMBER: CV-95-2339-PHX-SMM

CITE AND FACTUAL SUMMARY:

State v. Hooper, 145 Ariz. 538, 703 P.2d 482 (1985).

On the evening of December 31, 1980, William Bracy and Murray Hooper (both of whom were from Chicago), and Edward McCall (a former Phoenix police officer) went to the Home of Patrick Redmond in Phoenix. Mr. Redmond, his wife, and his mother-in-law, Helen Phelps, were at home preparing for a New Year's Eve party. Bracy, Hooper, and McCall entered the house at gunpoint and forced the Redmonds and Mrs. Phelps into the master bedroom. After taking jewelry and money, the intruders bound and gagged the victims. They then shot each victim in the head and also slashed Mr. Redmond's throat. Mr. Redmond and Mrs. Phelps died from their wounds, but Mrs. Redmond survived and later identified all three killers. Bracy and Hooper were convicted of the murders following a joint trial. McCall and Robert Cruz (who was alleged to have hired the killers) were also convicted of the murders following a joint trial. Cruz won a new trial on appeal, was convicted again, won another new trial on appeal, and was ultimately found not guilty. Joyce Lukezic (the wife of Mr. Redmond's business partner) was also charged with the murders, and was convicted in a separate trial. After obtaining a new trial, she was found not guilty.

DATE ENTERED FEDERAL DISTRICT COURT: 12/1/1998

PENDING IN DISTRICT COURT: 6 years, 8 months (still pending)

INITIAL PETITION
PAGE LENGTH: 5
CLAIMS RAISED: 1

AMENDED PETITION
DATE: June 11, 1999
PAGE LENGTH: 105
TOTAL CLAIMS: 39

DEFENDANT'S NAME: Jeffrey T. Landrigan

CASE NUMBER: Circuit No. 00-99011

CITE AND FACTUAL SUMMARY:

State v. Landrigan, 176 Ariz. 1, 859 P.2d 111 (1993).

On December 15, 1989, Chester Dean Dyer was found dead in his apartment by a co-worker, who went to his residence because they were concerned about his failure to appear for work. Mr. Dyer was found face down with an electrical cord at the front of his throat. The victim also had lacerations about his face and puncture wounds in the upper back. The victim's death was determined to have been caused by strangulation. Dyer had telephoned Michael Shaw at work on December 13, 1989, to let him know he had talked "Jeff" into coming to his apartment and was having sexual relations with Jeff. On December 20, 1989, the police arrested Landrigan on unrelated charges. Police later developed numerous items of evidence that tied Landrigan to the killing of Dyer

DATE ENTERED FEDERAL DISTRICT COURT: 10/16/ 1996

TIME PENDING IN DISTRICT COURT: 3 years, 5 months

INITIAL PETITION
PAGE LENGTH: 3
CLAIMS RAISED: 2

AMENDED PETITION
DATE: July 31, 1919
PAGE LENGTH: 58
TOTAL CLAIMS: 15

SECOND AMENDED PETITION
DATE: October 7, 1999
PAGE LENGTH: 10
TOTAL CLAIMS:

DATE ENTERED NINTH CIRCUIT: March 8, 2000

TIME PENDING IN NINTH CIRCUIT: 5 years, 5 months (still pending)

DEFENDANT'S NAME: Fred L. Robinson

CASE NUMBER: CV-96-669-PHX-JAT

CITE AND FACTUAL SUMMARY:

State v. Robinson, 165 Ariz. 51, 796 P.2d 853 (1990).

Robinson and Susan Hill lived together for a number of years. Beginning in 1984, Susan made several efforts to leave Robinson, but he always forced her to return. In February 1987, Susan left Robinson for a week to visit her father, and stepmother, Sterleen Hill, in Yuma. After this visit, Susan went to California to live with other relatives and did not tell Robinson. On June 8, 1987, Robinson decided to go to Yuma and bring Susan back. Robinson persuaded his friends, Theodore Washington and Jimmy Mathers, to go with him. The men loaded Robinson's car with weapons and drove to Yuma. Washington was wearing a red bandanna. Around 11:45 p.m., two men entered the Hills' home, forced Mr. and Mrs. Hill to lie on their bedroom floor, and tied them up. A black man wearing a red bandanna held a gun to Mr. Hill's head, then ransacked the drawers and closet while the second man stood over the Hills. One of the men shot the Hills with a 12-gauge shotgun. Mrs. Hill died from her wounds but Mr. Hill survived. Washington, Robinson and Mathers were tried jointly and each received the death penalty. On appeal the state supreme court reversed Mathers' conviction finding insufficient evidence to support the jury verdict

DATE ENTERED FEDERAL DISTRICT COURT: 03/14/ 1996

TIME PENDING IN DISTRICT COURT: 9 years, 5 months (still pending)

INITIAL PETITION
PAGE LENGTH: 10
CLAIMS RAISED: 10

AMENDED PETITION
DATE: May 7, 1997
PAGE LENGTH: 79
TOTAL CLAIMS: 9

DEFENDANT'S NAME: Alfonso R. Salazar

CASE NUMBER: CV-96-085-TUC-JMR

CITE AND FACTUAL SUMMARY:

State v. Salazar, 173 Ariz. 399, 844 P.2d 566 (1992).

On July 25, 1986, Salazar and Michael Davis pulled the wrought iron bars from a window and entered the Tucson home of Sarah Kaplan. Ms. Kaplan was 83 years old, weighed less than 90 pounds, was 5 feet tall, and wore a patch on one eye. Salazar and Davis beat her and strangled her with the telephone cord. Fingerprints belonging to both men were found at the scene. One of Salazar's prints was in blood. In a separate trial, Davis was convicted and sentenced to death.

DATE ENTERED FEDERAL DISTRICT COURT: 02/05/1996

DAYS PENDING IN DISTRICT COURT: 9 years, 6 months (still pending)

PRELIM PETITION
PAGE LENGTH: 3
CLAIMS RAISED: 0

PETITION
DATE: 12/19/1997
PAGE LENGTH: 81
TOTAL CLAIMS: 12

AMENDED PETITION
DATE: 7/30/99
PAGE LENGTH: 77
TOTAL CLAIMS: 13

#121963

EXHIBIT C

RICHARD MICHAEL ROSSI, United States District Court (Arizona) Case No. CIV-96-00990; United States Court of Appeals, Ninth Circuit, Case No. 01-99010.

Rossi murdered Harold August in 1983. He also shot Mr. August's neighbor (who attempted to come to Mr. August's aid), but the neighbor lived, identified Rossi as the killer, and testified against him at trial. Rossi was convicted and sentenced to death in 1984. He denied involvement in the murder and attempted murder at trial. After receiving a death sentence, Rossi eventually admitted committing these crimes, but then claimed (as he does today) that his criminal conduct was attributable to his cocaine addiction. On appeal to the Arizona Supreme Court in 1985, his convictions were affirmed, but his death sentence was vacated and the case sent back to the trial judge for resentencing. The same trial judge again sentenced Rossi to death. In his second appeal, the Arizona Supreme Court again found error in the proceeding and remanded the case for a third sentencing. Because the trial judge had retired, the case was reassigned to a different judge, Phillip Marquardt. Judge Marquardt sentenced Rossi to death for a third time. In his third appeal, in 1992, the Arizona Supreme Court upheld the sentence.

In 1993, Rossi filed a 147-page, 40-issue post-conviction relief petition in the state trial court, arguing 40 errors. Because Judge Marquardt had been disbarred in 1992 for using marijuana, the post-conviction proceedings were conducted by another judge, who found no merit to the claims. The claims included Rossi's contention that he was entitled to a new sentencing because of Marquardt's marijuana habit. The Arizona Supreme Court declined to review the trial court's decision. In 1996, Rossi commenced his federal habeas corpus proceedings. He filed a 130-page, 36-issue petition in March, 1997. The district court judge denied the petition in September, 2000. In June, 2001, the district court filed a certificate of appealability. The docket sheet for Rossi's district court case includes 145 different pleadings and orders.

Rossi filed his appellate brief in the Ninth Circuit earlier this year. He raised six issues, none of which call his guilt into question. Most prominent among the issues is Rossi's claim that he is entitled to a new sentencing because former Judge Marquardt was using marijuana in the late 1980's, when he imposed Rossi's third death sentence. Another Arizona death row inmate, Warren Summerlin, raised the same issue in his pending appeal. Rossi supports his claim with two affidavits—one from himself and another from his investigator—that Marquardt slept through part of the third sentencing hearing. These affidavits were written more than 5 years after the fact, and only after Marquardt's marijuana usage became public knowledge. The state court and federal district court denied relief because the Arizona Supreme Court independently reviewed all the evidence that Marquardt had, and unanimously reached the same conclusion: that Rossi must receive a death sentence.

Rossi also claims that his attorney at his third sentencing was ineffective for not discovering Rossi's alleged "organic brain damage" (a malady that numerous other Arizona death row inmates claim to have), even though six different psychologists and psychiatrists treated or evaluated Rossi, and none of them indicated the possibility that he might be brain-damaged. The Federal Public Defender's office hired a California-based neuro-psychologist, Tony R. Strickland (approximately $300 per hour, $4500 per day of testimony) who concluded that Rossi

has "organic brain damage," but the district court refused to consider Strickland's written report because Rossi never raised this claim in state court. The sentencing court already found as a mitigating circumstance that Rossi's cocaine use "significantly impaired his capacity to conform his conduct to the requirements of law" at the time of the murder, so it is difficult to understand what difference evidence of "organic brain damage" (which Rossi attributes to his cocaine use) would have made, especially given Rossi's IQ score of 119 and the fact that Rossi is a published author (see "Additional Information" below).

Rossi also complains that the sentencing court erred in failing to find that his cocaine use prevented him from fully appreciating the wrongfulness of his conduct, even though he attempted to persuade a friend of his to kill the surviving victim (so she could not testify against him) after he was imprisoned and no longer using cocaine.

Rossi faults the sentencing court for not considering his "admission of guilt" and "genuine remorse" as mitigating circumstances, even though he denied any involvement in the crimes until *after* he received a death sentence. He also attacks the sentencing court's finding of special heinousness and depravity, despite the fact that Rossi awarded bullets to his friends as "souvenirs" after the murder, and the fact that Rossi complained "that the bullets did not make as big a hole as they were supposed to."

The Ninth Circuit has added an issue to Rossi's appeal, asking the parties to address whether fundamental error satisfies the exhaustion requirement, despite five published 9th Circuit decisions reaching the opposite conclusion.

Additional Information: Last year, to the great upset of the murder victim's family, Rossi published a book entitled "Waiting to Die" (Vision Paperbacks, London UK; ISBN No. 1-904132-52-9). See http://www.visionpaperbacks.co.uk/bookDetails.php The publisher's description of the book, seemingly oblivious to the cruel irony, includes the statement, "Rossi asks whether it is right that a prisoner should suffer years of physical and psychological torture, deprivation and neglect before their eventual execution." Apparently, the publisher simply accepts Rossi's characterization of death row as a "life of horrendous medical neglect, inadequate food and unrelenting abuse at the hands of the prison authorities." Perhaps this kind of statement will help European book sales.

JOE LEONARD LAMBRIGHT, District Court Case No. Civ 87-235-TUC; Ninth Circuit Case No. 04-99010.

Lambright and his accomplice, Robert Smith, murdered a mentally disturbed young woman who had the misfortune to be hitchhiking when Lambright and Smith drove by. The murder occurred in Tucson, 25 years ago. Both Lambright and Smith are still on Arizona's death row. The murder happened because Lambright wanted "to kill somebody just to see if he could do it." After repeatedly raping their terrified victim, Lambright and Smith bludgeoned and stabbed her to death, and kept her jewelry as souvenirs. They celebrated the murder afterwards by playing "We are the Champions" in the cassette player of their car.

This case has been in federal court for 18 years. The only issues being litigated for at least the last 5 years are sentencing issues; there is no question that Lambright committed the crime. Lambright's case has generated 5 published Ninth Circuit opinions and one published district court decision, and Lambright has another Ninth Circuit appeal pending.

The Ninth Circuit published its most recent opinion in this case in March, 2001. It reversed the district court's denial of Lambright's habeas petition, finding that Lambright's procedural default of his ineffectiveness claims did not bar federal habeas review, and that the district court erred in refusing to conduct an evidentiary hearing on Lambright's ineffective-assistance-of-counsel claims. Specifically, Lambright argued that his state court attorney was ineffective for failing to develop mitigation evidence of two facts that could have influenced the decision to impose a death sentence: (1) post-traumatic stress disorder based on Lambright's purported combat experiences in Vietnam, and (2) methamphetamine-induced psychosis based on Lambright's self-reported use of the drug.

Both of Lambright's ineffective assistance claims were based on affidavits from experts hired by Lambright's appointed federal habeas attorneys. One expert was "a medical doctor specializing in psychiatry with a sub-specialty in neurology and post traumatic stress disorder," and the other was "a pharmacologist ... who concluded that 'chronic amphetamine use such as is reported by Mr. Lambright may cause long-term psychiatric changes including anxiety reactions [and] psychosis.'" *Lambright v. Stewart*, 241 F.3d 1201, 1207 (9th Cir. 2001). Neither of these experts ever testified in Lambright's federal habeas corpus proceedings.

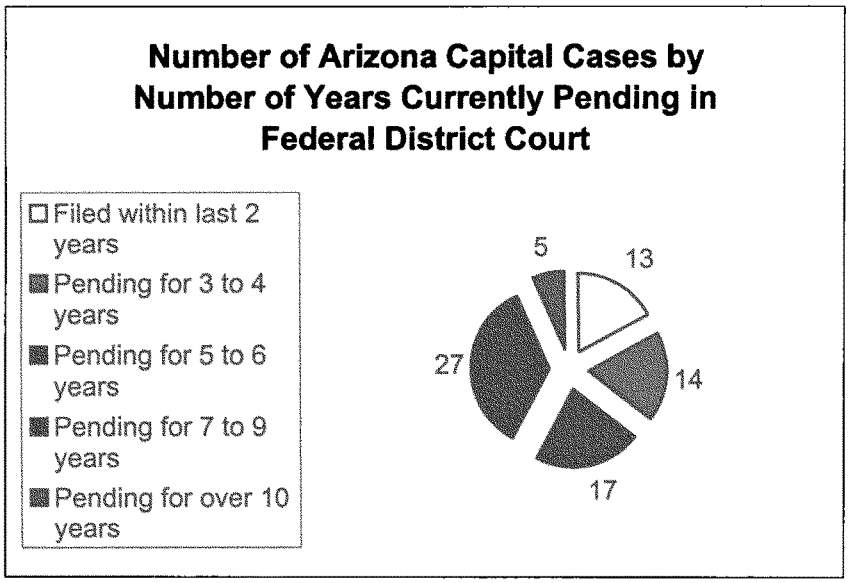
In November, 2003, the district court presided over a 6-day evidentiary hearing. Lambright refused to answer any questions regarding the circumstances of the murder, including his self-reported drug use. He did, however, testify under oath (both at a deposition and at the hearing) that his "best friend" in Vietnam (whose last name was "Neidhardt" but whose first name Lambright could not recall) was "cut in half" by machine gun fire and died in his arms, an event that occurred during a nighttime patrol outside of the air base where Lambright was stationed. Lambright's new expert (not the one whose affidavit led to the hearing), who regularly testifies on behalf of criminal defendants and habeas petitioners, testified that Lambright had post-traumatic stress disorder based on the Vietnam combat event. The state's psychological expert testified that Lambright showed no sign of having PTSD, and expressed doubt that the traumatic event had occurred in the first place.

It turned out that Lambright was a sergeant in the Air Force in the 1960's and had spent 3 months at an air base in Vietnam in 1968, working as a jet engine mechanic. If every witness other than Lambright is to be believed, Lambright was never in combat. Three Air Force Security Police personnel testified at the hearing, and another filed an affidavit. All of them were stationed at the same air base where Lambright worked, when Lambright was working there. They all testified that there were no combat events, no night-time patrols, and no combat-related fatalities during that time period.

The more evidence was gathered, the more obvious it became that Lambright had invented his combat story. Still, his attorneys insisted on pursuing the claim. Prosecutors even located Lambright's former Air Force buddy, Mr. Neidhardt, who was alive and well and living in Alabama. Mr. Neidhardt filed an affidavit informing the court that he was a close friend of Neidhardt's when the two men were stationed together in Texas in 1967, but that he had never served at the Vietnam air base where Lambright was stationed, and he had never been in combat. Lambright testified that he did not know this man, and that he was not the same "Neidhardt" who died in Vietnam. Official archives of United States military personnel killed in Vietnam contain no listing for anyone with a name similar to "Neidhardt." Lambright responded to cross-examination on this point by speculating that "Kneidhardt" might be spelled with a silent "K." The State expanded its National Archive exhibits to include the last names starting with "K," which also contain no name similar to "Kneidhardt." Lambright also speculated that Neidhardt's death went unrecorded because the Air Force wanted to minimize its reported casualties. The more prosecutors disproved Lambright's story, the more stubbornly he clung to it.

In short, the State proved beyond any doubt that Lambright's combat event never occurred, and the PTSD diagnosis based on it was necessarily wrong. Similarly, Lambright's amphetamine psychosis theory found no support in fact. Despite years of investigation, Lambright's attorneys never produced a single witness or introduced any other evidence to prove that Lambright used methamphetamine on the day of, or in the days leading up to, the murder.

The district court denied Lambright's claims once again. Lambright's experts had accepted Lambright's self-serving combat and drug stories unquestioningly, based solely on Lambright's own statements. Lambright had obtained an evidentiary hearing and extended his federal habeas corpus proceedings for several years (the appeal is pending even now), simply by telling lies to the experts hired by his attorneys, and blaming his trial lawyer for not discovering and presenting facts that never existed in the first place.


Number of Arizona Capital Cases by Number of Years Currently Pending in Federal District Court
Filed within last 2 years
Pending for 3 to 4 years
Pending for 5 to 6 years
Pending for 7 to 9 years
Pending for over 10 years
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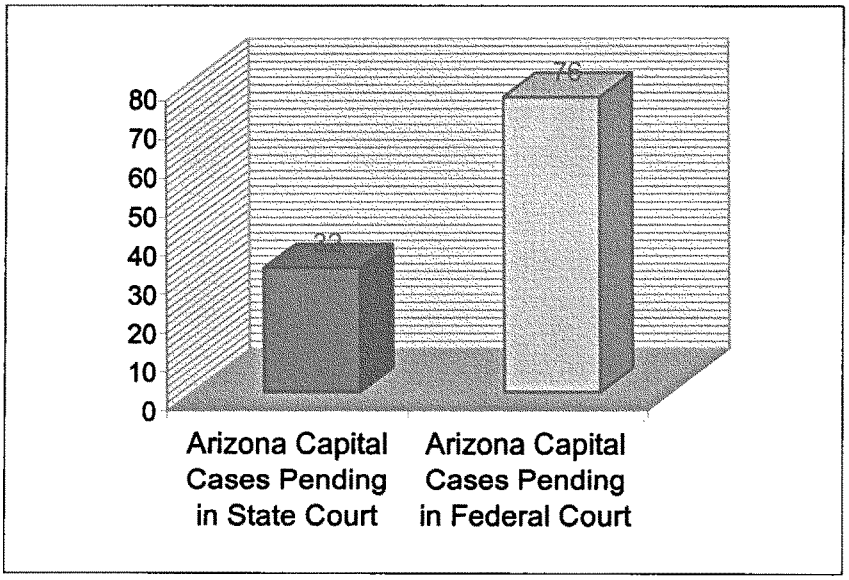
13
27
14
17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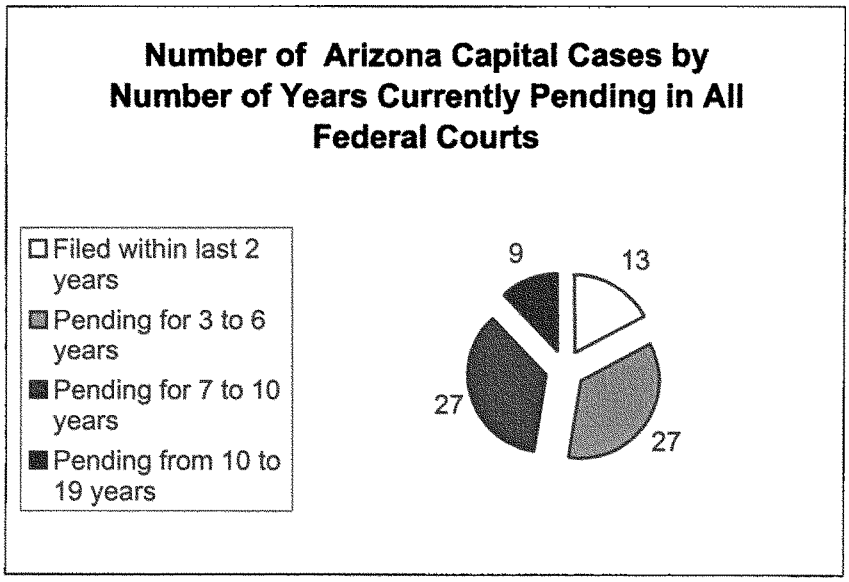
Arizona Capital Cases Pending in State Court
Arizona Capital Cases Pending in Federal Court


Number of Arizona Capital Cases by Number of Years Currently Pending in All Federal Courts
Filed within last 2 years
Pending for 3 to 6 years
Pending for 7 to 10 years
Pending from 10 to 19 years
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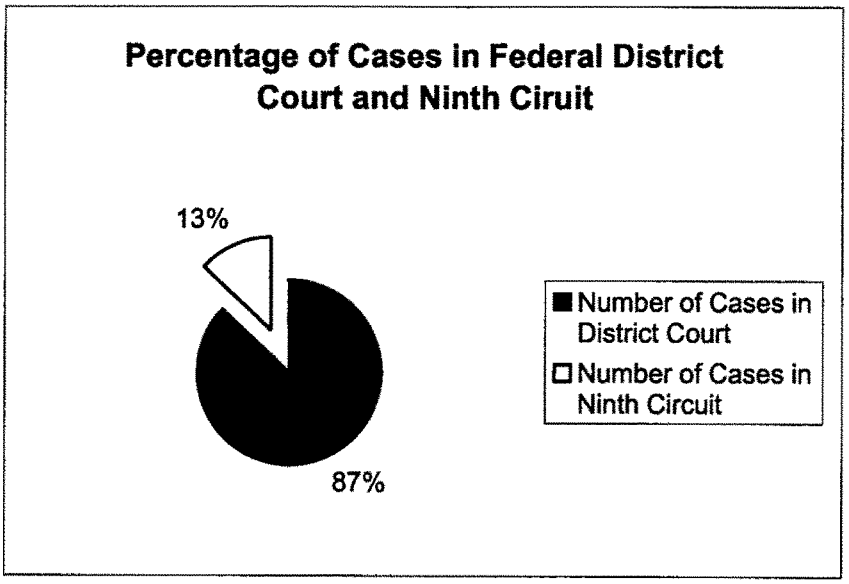
27
27


Percentage of Cases in Federal District Court and Ninth Ciruit
13%
87%
Number of Cases in District Court
Number of Cases in Ninth Circuit

Length of Time Arizona Capital Cases Have Been Pending in Federal Courts

(As of August 19, 2005)

Defendant's Name	Current Case #	Date Filed in District Court	Date Filed in 9th Circuit	Date Remanded to DC	Date Refiled in 9th Circuit	Date Remanded to DC	Date Refiled in 9th Circuit	Total Time in District Court	Total Time in 9th Circuit	Total Years Spent in Federal Court
Summerlin, W.W. *	Circuit No. 98-99002	4/11/1986	3/18/1998					11 y 11 m	7 y 5 m	19.33
Smith, Rbt. D. **	Circuit No. 96-99026	4/14/1987	12/31/1996					9 y 8 m	8 y 8 m	18.33
Lambright, J.L.	Circuit No. 04-99010	4/14/1987	10/9/1996	5/25/2001	12/1/2004			13 y 1 m	5 y 3 m	18.33
Correll, M.E.	Circuit No. 03-99006	9/15/1987	7/7/1993	6/1/1998	5/20/2003			10 y 9 m	7 y 2 m	17.92
McMurtrey, J.N.	Circuit No. 0-99002	12/19/1988	3/26/2003					14 y 3 m	2 y 5 m	16.67
Moormann, R.H.	Circuit No. 00-99015	7/11/1991	10/30/2000					9 y 3 m	4 y 10 m	14.08
Beaty, D.E	Circuit No. 00-99007	11/6/1992	4/6/2000	12/8/2002				10 y 1 m	2 y 8 m	12.75
Comer, R.C.	Circuit No. 98-99003	7/19/1994	3/18/1998	6/9/2000	6/24/2002			5 y 8 m	5 y 5 m	11.08
Williams, R.T.	Circuit No. 01-99015	8/15/1995	8/21/2001					6 y 0 m	4 y 0 m	10.00
Washington, T.	CV-95-246-PHX-JAT	11/9/1995						9 y 9 m	N/A	9.75
Salazar, A.R.	CV-96-085-TUC-FRZ	2/5/1996						9 y 6 m	N/A	9.50
Robinson, F.L.	CV-96-669-PHX-JAT	3/14/1996						9 y 5 m	N/A	9.42
Rossi, R.M.	Circuit No 01-99010	4/23/1996	7/13/2001					5 y 3 m	4 y 1 m	9.33
Landrigan, J.T	Circuit No. 00-99011	10/16/1996	5/8/2000					3 y 7 m	5 y 3 m	8.83
Cook, D.W.	CV-97-146-PHX-SMM	1/24/1997						8 y 7 m	N/A	8.58
Schurz, E M.	CV-97-580-PHX-EHC	3/20/1997						8 y 5 m	N/A	8.42
Lopez, G M.	CV-97-244-TUC-WDB	3/17/1997						8 y 5 m	N/A	8.42
Hill, C D.	CV-97-1142-PHX-RCB	5/28/1997						8 y 3 m	N/A	8.25
Nash, V.L.	CV-97-1104-PHX-RGS	5/19/1997						8 y 3 m	N/A	8.25
Ramirez, D.M.	CV-97-1331-PHX-JAT	6/26/1997						8 y 2 m	N/A	8.17
Apelt, R.	CV-97-1249-PHX-ROS	6/12/1997						8 y 2 m	N/A	8.17
Williams, A.	CV-97-1239-PHX-PGR	6/10/1997						8 y 2 m	N/A	8.17
Scott, R.M.	CV-97-1554-PHX-PGR	7/25/1997						8 y 1 m	N/A	8.08
Libberton, L.K.	CV-97-1881-PHX-EHC	9/9/1997						7 y 11 m	N/A	7.92
Schad, E.H	CV-97-2577-PHX-ROS	12/16/1997						7 y 8 m	N/A	7.67
Greenway, R.M.	CV-98-0025-TUC-WDB	1/14/1998						7 y 7 m	N/A	7.58
Spencer, C.L.	CV-98-0068-PHX-SRB	1/13/1998						7 y 7 m	N/A	7.58
Lopez, S.V.	CV-98-0072-PHX-SMM	1/13/1998						7 y 7 m	N/A	7.58
Milke, D.J.	CV-98-0060-PHX-RCB	1/12/1998						7 y 7 m	N/A	7.58
Wood, J	CV-98-053-TUC-JMR	2/3/1998						7 y 6 m	N/A	7.50
Atwood, F.J.	CV-98-116-TUC-JCC	3/12/1998						7 y 5 m	N/A	7.42
Stanley, M	CV-98-0430-PHX-MHM	3/9/1998						7 y 5 m	N/A	7.42
Apelt, M	CV-98-0882-PHX-ROS	5/14/1998						7 y 3 m	N/A	7.25

Length of Time Arizona Capital Cases Have Been Pending in Federal Courts

(As of August 19, 2005)

Defendant's Name	Current Case #	Date Filed in District Court	Date Filed in 9th Circuit	Date Remanded to DC	Date Refiled in 9th Circuit	Date Remanded to DC	Date Refiled in 9th Circuit	Total Time in District Court	Total Time in 9th Circuit	Total Years Spent in Federal Court
West, T.P.	CV-98-218-TUC-FRZ	5/6/1998						7 y 3 m	N/A	7.25
King, E.J.	CV-98-1277-PHX-RCB	7/14/1998						7 y 1 m	N/A	7.08
Stokley, R.D.	CV-98-332-TUC-FRZ	7/14/1998						7 y 1 m	N/A	7.08
Runningeagle, S B	CV-98-1903-PHX-PGR	10/21/1998						6 y 10 m	N/A	6.83
Bible, R.L.	CV-98-1859-PHX-PGR	10/15/1998						6 y 10 m	N/A	6.83
Gulbrandson, D.	CV-98-2024-PHX-SMM	11/6/1998						6 y 9 m	N/A	6.75
Styers, J.L.	CV-98-2244-PHX-EHC	12/16/1998						6 y 8 m	N/A	6.67
Hooper, M.	CV-98-002164-SMM	12/1/1998						6 y 8 m	N/A	6.67
Hinchey, J A.	CV-99-0798-PHX-ROS	4/30/1999						6 y 4 m	N/A	6.33
Murray, Robert	CV-99-1812-PHX-DGC	10/8/1999						5 y 10 m	N/A	5.83
Gonzales, E.V.	CV-99-2016-PHX-SMM	11/15/1999						5 y 9 m	N/A	5.75
Walden, R.L.	CV-99-00559-TUC-RCC	11/10/1999						5 y 9 m	N/A	5.75
Medrano, A.M.	CV-9900-603-TUC-JMR	12/14/1999						5 y 8 m	N/A	5.67
Kemp, T.	CV-00-00050-TUC-FRZ	1/21/2000						5 y 7 m	N/A	5.58
Hurles, R.D.	CV-00-0118-PHX-SMM	1/21/2000						5 y 7 m	N/A	5.58
James, S.C.	CV-00-1118-PHX-SMM	6/9/2000						5 y 2 m	N/A	5.17
Spears, A.M.	CV-00-1051-PHX-SMM	6/1/2000						5 y 2 m	N/A	5.17
Rogovich, P.C.	CV-00-1896-PHX-ROS	10/5/2000						4 y 10 m	N/A	4.83
Jones, D.L.	CV-01-0384-PHX-SRB	2/28/2001						4 y 6 m	N/A	4.50
Dickens, G.	CV-01-757-PHX-SMM	4/27/2001						4 y 4 m	N/A	4.33
Gallegos, M S.	CV-01-1909-PHX-ROS	10/5/2001						3 y 10 m	N/A	3.83
Lee, C.A. (D)	CV-01-2178-PHX-EHC	11/8/2001						3 y 9 m	N/A	3.75
Lee, C.A. (R & L)	CV-01-2179-PHX-EHC	11/8/2001						3 y 9 m	N/A	3.75
Jones, B L	CV-01-00592-TUC-FRZ	11/6/2001						3 y 9 m	N/A	3.75
Miles, K	CV-01-00645-TUC-RCC	12/11/2001						3 y 8 m	N/A	3.67
Hedlund, C.	CV-02-0110-PHX-SMM	1/18/2002						3 y 7 m	N/A	3.58
Djerf, R.K.	CV-02-0358-PHX-JAT	2/27/2002						3 y 6 m	N/A	3.50
Spreitz, C.J.	CV-02-00121-TUC-CKJ	3/8/2002						3 y 5 m	N/A	3.42
Henry, G S.	CV-02-0656-PHX-SRB	4/10/2002						3 y 4 m	N/A	3.33
Doerr, E.	CV-02-0582-PHX-SMM	4/3/2002						3 y 4 m	N/A	3.33
Towery, R.C.	CV-03-00826-PHX-MHM	4/30/2003						2 y 4 m	N/A	2.33
McKinney, J	CV-03-00774-PHX-DGC	4/24/2003						2 y 4 m	N/A	2.33
Murray, Roger	CV-03-775-PHX-DGC	4/24/2003						2 y 4 m	N/A	2.33

Length of Time Arizona Capital Cases Have Been Pending in Federal Courts

(As of August 19, 2005)

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Mann, E.O.	CIV-03-00213-TUC-CKJ	4/23/2003						2 y 4 m	N/A	2.33
Schackart, R.	CV-03-00287-TUC-DCB	5/30/2003						2 y 3 m	N/A	2.25
Rienhardt, C.B.	CV-03-00290-PHX-DCB	5/30/2003						2 y 3 m	N/A	2.25
Jones, R.G.	CV-03-00478-TUC-DCB	9/18/2003						1 y 11 m	N/A	1.92
Smith, T.	CIV 03-1810-PHX-SRB	9/17/2003						1 y 11 m	N/A	1.92
Clabourne, S D.	CV-03-00542-TUC-RCC	10/29/2003						1 y 10 m	N/A	1.83
Greene, B.J.	CV-03-00605-TUC-FRZ	12/5/2003						1 y 8 m	N/A	1.67
Lee, D	CV-04-00039-PHX-MHM	1/9/2004						1 y 7 m	N/A	1.58
Poyson, R.A.	CV-04-00534-PHX-NVW	3/17/2004						1 y 5 m	N/A	1.42
Van Adams, J	CV-04-01359-PHX-MHM	7/1/2004						1 y 1 m	N/A	1.08

* The time includes appeal to the United States Supreme Court to correct Ninth Circuit decision. *See Schriro v. Summerlin*, 542 U S. 348 (2003)

** The time includes appeal to the United States Supreme Court to correct Ninth Circuit decision. *See Stewart v. Smith*, 536 U.S. 856 (2002)

Questions From Chairman Specter
Presented to Seth P. Waxman
"Habeas Corpus Proceedings and Issues of Actual Innocence"

Q1. In your written testimony you say that you are "aware of no data demonstrating that the streamlining provisions of AEDPA have failed to accomplish their purpose." However, many critics of the current state of habeas law have talked about their concern with that unnecessary and protracted delays of habeas cases continue despite the one year time limitation that the Antiterrorism and Effective Death Penalty Reform Act imposed.

In fact, Mr. Delgenos, in his testimony has discussed his concerns over these delays, describing the common technique of seeking "stay and abey" to buy time on appeal. Mr. Delgenos says, "What happens is this: Prisoners file habeas petitions that contain some claims that have already been rejected by the state courts, and one or more new claims. The district court then "stays" the petition, and places it in suspense, while the petitioner tries to exhaust the new claim(s) in state court, in effect starting the process over again."

Although data on point may be difficult to obtain at this point, it seems that there is a problem of some degree that would be addressed in this bill. Do you have other suggestions for preventing this "stay and abey" technique?

A1. Especially in light of the Supreme Court's recent decision in *Rhines v. Weber*, 125 S. Ct. 1528 (2005), I do not agree that there remains any problem with what Mr. Delgenos describes as the "stay and abey technique."

As you understand, AEDPA establishes requirements that occasionally create tension. On the one hand, a state prisoner is obliged to exhaust all available state avenues for advancing a federal claim before taking the claim to federal court. That requirement obviously entails postponing federal habeas litigation. On the other hand, a prisoner must satisfy a one-year deadline, which necessarily entails speeding things up. If a prisoner is to meet both obligations, something has to give.

In the main, AEDPA defuses the tension by tolling the filing period while a prisoner is in state postconviction proceedings exhausting state remedies. Yet AEDPA does not toll for the time a federal petition is pending in federal court. The Supreme Court so held in *Duncan v. Walker*, 533 U.S. 167 (2001). Cases arise, then, in which a prisoner thinks he or she has exhausted state remedies with respect to all claims and thus files a federal petition. Then, some time later, the federal court concludes that there is still some means by which the prisoner can put one or more claims to the state courts. Prior to AEDPA, the appropriate action was clear. Under the Court's decision in *Rose v. Lundy*, 455 U.S. 509 (1982), the federal court would dismiss the petition in its entirety, without prejudice to another petition after the exhaustion doctrine was satisfied with respect to all claims. Now, however, that disposition can risk inefficiency and unfairness. Given *Duncan*, the clock has been running while the prisoner's federal petition has been before the federal court. It will stop as soon as the prisoner files a

petition in state court, but there may be insufficient time left to get to state court and back before one year passes.

The Supreme Court recognized that the *Duncan* decision created this dilemma in some cases, but found it impossible to read AEDPA's language in a way that would avoid it. In *Rhines v. Weber*, 125 S. Ct. 1528 (2005), however, the Court held that a federal district court can resolve the dilemma by holding a federal petition in abeyance while a prisoner returns to state court—but only when there is "good cause" for the prisoner's failure to exhaust state remedies with respect to all claims before an initial federal petition is filed.

I gather that Mr. Delgenos worries that district courts stay federal petitions too frequently. Yet he is probably thinking of lower-court decisions prior to *Rhines*. If he argues that *Rhines* itself is problematic, he has misread that decision.

Justice O'Connor wrote the Court's opinion in *Rhines*, and all the other members of the Court joined in the judgment and most of her opinion. Chief Justice Rehnquist, Justice Scalia, and Justice Thomas joined both her opinion and her result. There are reasons why the Court was united in that case. Listen to Justice O'Connor:

> As a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy's* dismissal requirement, petitioners who come to federal court with "mixed" petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims. If a prisoner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review. . . . Similarly, if a district court dismisses a mixed petition close to the end of the 1-year period, the petitioner's chances of exhausting his claims in state court and refilling his petition in federal court before the limitations period runs are slim. . . . Even a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion. Thus, whether a petitioner ever receives federal review of his claims may turn on which district court happens to hear his case.

Justice O'Connor approved the practice of holding petitions in abeyance as a sensible means of accommodating both the exhaustion requirement and the filing deadline. Importantly, however, she held that district courts cannot follow that practice routinely, but can do so only in "limited circumstances" where there is "good cause" for the prisoner's failure to satisfy the exhaustion doctrine with respect to all claims before filing an initial federal petition.

If, then, district courts frequently held federal petitions in abeyance prior to *Rhines*, they can no longer do so. The Supreme Court has sustained that practice, but attached a "good cause" condition that restricts it to a minimum.

It may well be that the Court would have done better to allow stays without demanding "good cause." Writing separately in *Rhines*, Justices Souter, Ginsburg, and Breyer suggested a more generous condition. In any case, the "good cause" standard the Court adopted more than responds to the concerns that Mr. Delegenos has expressed.

Finally, let me say that this point about stays is yet more proof that S. 1088 is not tailored to resolving real continuing problems in the system. This particular section was plainly drafted before *Rhines* was decided and did not anticipate the "good cause" requirement the Court would adopt. Now that any perceived overuse of the authority to stay petitions is at an end, this section is outdated and should be removed from the bill. Of course, as you know, I think all the sections are due for much more study in light of hard, reliable data on what, if any, problems attend the habeas process in the wake of AEDPA.

Q2. Innocence Standard: Mr. Waxman, In your written testimony, you have joined others in criticizing the Streamlined Procedures Act, specifically section 9 of the bill which you argue will narrow the availability of habeas corpus procedures for capital cases by barring any habeas review other than where the applicant satisfied section 2254(e)(2). You indicate that in essence, the Kyl bill would "flatly repeal basic habeas jurisdiction in death penalty cases."

While most critics acknowledge that the bill includes numerous exceptions to procedural rules for claims of actual innocence, they conclude that the exceptions are far too narrow, far too limited, and far too constrained to prevent innocent persons from being executed or sent to prison.

As you are aware, the bill relies on current law's section 2254(e)(2) to set the standard for presenting actual-innocence claims. This section requires that the evidence of innocence be clear and convincing, and that the defendant show that the evidence was not previously available to him.

The Justice Department proposed using the actual-innocence test in 2254(e)(2) (or the related provision in 2244(b)(2)) as the standard for allowing unexhausted or defaulted claims to go forward in its July 17, 2003 testimony before the House Crime Subcommittee. State prosecutors have long stressed the importance of using this standard in order to prevent defendants from simply relitigating the same evidence that they presented at trial, or litigating marginal or cumulative evidence that previously was available to them and that they simply chose not to use. Senator Kyl and the proponents of S. 1088 would argue that these sections set a flexible standard that gives judges the necessary discretion to allow important claims to go forward while barring frivolous appeals.

Section 2254(e)(2) and 2244(b)(2) were enacted as part of the 1996 reforms. They have been in use for nearly a decade, and many cases have been decided under these standards, particularly 2244(b)(2), which sets the standard for bringing a second habeas petition. These tests have been used over and over again in cases before the courts.

Given your opposition to the Streamlined Procedures Act's use of this standard, can you give us an example of an actual case where this code section has barred a court from considering a claim of innocence that should have been allowed to go forward?

A2. I agree with others who regard the standards in §2254(e)(2) as far too narrow to accommodate cases in which prisoners actually may be innocent. Those standards were drawn to govern the entirely different question whether federal courts can hold evidentiary hearings to determine facts that were not developed in state court. It is a mistake to use them as a one-size-fits-all answer to the risk that this bill will foreclose claims advanced by prisoners who may well be innocent.

The language in question is in paragraphs (A)(ii) and (B), which, taken together, allow a federal court to hold a hearing despite a prisoner's lack of diligence in state court only if a claim relies on "(A)(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence" *and* "(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

Few prisoners would be able to satisfy those standards. Notice, in particular, two things: (1) the only new factual information touching innocence that is relevant must underlie the legal claim the prisoner advances in his petition; and (2) that information must be such that it could not have been discovered previously with the utmost effort. In *Williams v. Taylor*, 529 U.S. 420 (2000), Justice Kennedy explained that the point is not that evidence would have been hard to discover earlier, but that it did not *exist* previously to *be* discovered.

You have asked me to identify a case in which a district court following the standards in paragraphs (A)(ii) and (B) would have been unable to entertain a claim advanced by a prisoner who might have been innocent. On short notice, I am not able to do a rigorous review of the case law. However, I have consulted publicly available descriptions of recent cases. The first case on the list appears to be precisely the kind of case you have in mind.

Timothy Brown was a 14-year-old boy with an IQ of 56. In 1991, he was convicted of first-degree murder and sentenced to life in prison without possibility of parole. No physical evidence, eyewitness testimony, or motive linked him to the crime. The only evidence against him was the statement of a co-defendant, King, who said that Brown had committed the murder. Brown's own statement to the police (which named King as the perpetrator) was also admitted. The Florida courts denied Brown's appeal in an unsigned order without written opinion. Shortly thereafter, King recanted his statement, indicating that police had beaten him and threatened him with the electric chair. *See Brown v. Singletary*, 229 F. Supp. 2d 1345 (S. D. Fla. 2002).

Less than a year after denial of his appeal, in December of 1995, Brown filed a *pro se* habeas corpus petition in federal court. While his petition was pending, he discovered stunning new evidence pointing to his innocence. Unbeknownst to Brown, an informant had reported to the police that another man, Johnson, had admitted killing the victim. Notwithstanding that new evidence of wrongful conviction, the State continued to resist Brown's federal petition. Under the standards in place at the time, the federal court held a hearing, determined that the information about Johnson established Brown's probable innocence, and concluded that Brown's constitutional claim that his statement was inadmissible could be considered.

The federal court summarized the import of the evidence implicating Johnson as the real culprit as follows:

> Essentially, the Court was presented with two people [Johnson and his wife], who, over a ten month period of time, tell virtually identical stories about a murder that occurred eleven years earlier. Johnson and [his wife's] stories are too consistent to be complete fabrications. In addition, the Court has been presented with a man [Johnson] who knows virtually every detail about the crime. Details he has repeated to several different people. Finally, the Court has been presented with a man who has a motive for murder. Johnson hated the man he intended to kill. *Brown*, 229 F. Supp. 2d at 1364.

Brown ultimately obtained relief on his invalid confession claim. *Brown v. Crosby*, 249 F. Supp. 2d 1285 (S.D. Fla. 2003). A *Miami Herald* investigation discovered that at least 37 other false or questionable confessions to murder, all obtained by the same sheriff's department, have been thrown out since 1990. After nearly 12 years in prison, Brown was released at age 26, and prosecutors dropped all charges against him.

If the standards in § 2254(e)(2) [or, in the alternative, the standards in § 2244(b)(2)] had governed Brown's case, the new evidence concerning King would have been foreclosed. That evidence did not go to "facts *underlying the claim*" (emphasis added). Nor did the "*claim*" rely on "a factual predicate that could not have been previously discovered through the exercise of due diligence." By contrast, the information about Johnson (exculpating though it was) was not directly related to Brown's claim regarding his own statement. Moreover, that information existed previously (though it was plainly unavailable to Brown).

Q3. You call section 9 the "most sweeping provision of all," saying that it "would flatly repeal *basic habeas jurisdiction in death penalty cases." Section 9 amends chapter 154 of title 28, which as a result of the 1996 Antiterrorism and Effective Death Penalty Reform Act, provides for expedited habeas proceedings for states whose death row defense counsel meets a sufficiently high standard. We have heard testimony today that the reforms and time limitations desired by Congress and President Clinton are largely being avoided. What middle ground might be reached that could address this problem without, as you say "completely withdraw[ing] federal jurisdiction to consider virtually all claims in capital cases?*

A3. I am unaware that the "reforms and time limitations" enacted in AEDPA are being avoided. As a matter of fact, so far as I am aware, district courts are enforcing AEDPA's provisions assiduously, particularly the new filing deadlines enacted in § 2254(d)(1).

You cite to the particular provisions for death penalty cases in the optional chapter, Chapter 154, which under current law can be triggered only if a State satisfies statutory standards for providing effective counsel to indigents in state postconviction proceedings. It is true that the provisions in Chapter 154 have not generally been operative, but that is because, in the main, States have not provided lawyers in state postconviction proceedings.

You have asked me whether there is some alternative arrangement that might obtain more state cooperation. I frankly doubt it. On the one hand, other provisions in AEDPA independently provide the States so many advantages in federal habeas corpus proceedings over prior law that it is hard to think what further material enticements could be offered. On the other, the provisions now in Chapter 154 offer comparatively little help to the system as a whole. To be sure, where Chapter 154 is invoked, prisoners have only six months (rather than a year) to file their petitions. But experience shows that the States are (quite properly) content with a one-year filing period.

As you know, the Powell Committee initially proposed the "opt-in" scheme as a device for encouraging States to supply good lawyers in state proceedings and thus, it was hoped, to ensure that cases were better prepared for federal court. Evidently, the Powell Committee hesitated to recommend that Congress take stronger measures. I recognize the concern that a federal mandate to the States would be unconstitutional. I have not done the necessary research, but it seems worth considering whether Congress might require the States to supply lawyers by legislation under Section Five of the Fourteenth Amendment or as an exercise of its Spending Clause authority.

I understand that your substitute amendment drops the jurisdiction-stripping language in the original bill. I want to applaud that development. The one thing that certainly should not be included in legislation meant to streamline the habeas process is a provision that flatly eliminates the federal courts' jurisdiction.

* * * * * * * * *

As I noted in my testimony, I firmly believe that S. 1088 would not improve the habeas process and would instead complicate the process, to the disadvantage of crime victims, innocent people charged with a crime, and others who have a valid interest in an expedited process. I also believe this to be true with regard to S. 1088 as amended.

The National Conference of State Chief Justices, at its recent national conference, adopted a resolution opposing the kinds of habeas proposals contained in these bills, urging that Congress not rush to judgment, and recommending that there be "additional study and analysis . . . to evaluate the impact of AEDPA to date and the causes of unwarranted delay, if any, including the availability and allocation of resources, and to consider appropriate targeted measures that will ameliorate the documented problems and avoid depriving the federal courts of their traditional jurisdiction without more supporting evidence."

As I stated to the Committee in my testimony and by follow-up letter, I would be happy to assist in such a study, and to make the resources of my law firm available. Until such a study is carried out, I believe that any action on S. 1088 or any other habeas legislation is premature, and I urge that the Committee not move forward on it.

Questions From Senator Patrick Leahy
Presented to Seth P. Waxman
"Habeas Corpus Proceedings and Issues of Actual Innocence"

Q1. Section 3 of S.1088 seems to be addressed to a case in which a prisoner files a petition, amends it by adding additional claims some time later, and then argues that the original filing stopped the clock with respect to AEDPA's one-year filing period. But just last month the Supreme Court decided in Mayle *v.* Felix *that amendments to habeas corpus petitions do not "relate back" to the time the petition was originally filed. If* Mayle *v.* Felix *has already fixed this problem, shouldn't Section 3 be dropped out of the bill? If* Mayle *v.* Felix *leaves problems in this area, then shouldn't this provision -- which was drafted before* Mayle *v.* Felix *-- be re-examined?*

A1. The first question asks whether the Supreme Court's recent decision in *Mayle v. Felix*, 125 S.Ct. 2562 (2005), has already solved any problem that Section 3 of S. 1088 might be understood to address and whether, in light of the *Felix* decision, Section 3 should be reassessed. The Court's decision in *Felix has* changed the legal landscape considerably. Section 3 would not only alter the law as it was prior to *Felix*, but would also overrule *Felix* itself. I urge you not to adopt Section 3 without further study.

Your question correctly identifies the scenario that Section 3 has in mind—a case in which a petitioner adds a new claim to a habeas petition by amendment and effectively extends the ordinary one-year filing period that would otherwise apply. Prior to *Felix*, the Ninth Circuit Court of Appeals had taken the view that any new claims related to a petitioner's "trial, conviction, or sentence" should be treated as though they were contained in the original petition, even if they were introduced by amendment more than a year later. In *Felix*, however, the Supreme Court held that only additional claims "tied to a common core of operative facts" will "relate back" to the time the original petition was filed. Accordingly, the tension between a petitioner's ability to amend a habeas petition, on the one hand, and the one-year filing period, on the other, has now been resolved.

Section 3 would address amendments in two ways: (1) by allowing only one amendment prior to the respondent's answer or the expiration of one year and (2) by forbidding any amendment thereafter, unless a petitioner meets the standards for filing a different, second or successive petition.

Now that *Felix* is in place, there is no reason to establish hard-and-fast limits on amendments in order to ensure that habeas corpus filing periods are respected. Certainly, it would be unwise to insist that further amendments must satisfy the tests for filing multiple habeas corpus applications. After all, if a petitioner can meet those standards, he or she can file another entirely new application and need not amend a current application.

It is true that a provision of AEDPA, 28 U.S.C. § 2266(b)(3)(B), limits amendments in death penalty habeas corpus cases much in the way that Section 3 would limit amendments in all cases. Yet that provision applies only to capital cases from States that supply counsel to

prisoners in state postconviction proceedings. Less than ten years ago, Congress concluded that it made sense to limit amendments only in those particular death penalty cases as an incentive to encourage states to provide good lawyers in state court. It is hard to think that Congress would now conclude that similar restrictions ought to be imposed in all cases, whether or not States supply lawyers in prior state proceedings.

Q2. Section 4 of S.1088 would have us legislate on what federal courts should do about procedural default in state court. But we have always left that to the Supreme Court. This bill will supersede a long line of Supreme Court decisions. Has the Court failed to manage these problems properly?

In my experience, the Supreme Court's decisions regarding the effects of procedural default in state court have quite effectively managed, and protected state interests, in default cases. I urge you not to uproot them without data demonstrating their inadequacy.

It makes sense that we should have rules encouraging prisoners to advance any federal claims they may have in state court at the time and in the manner prescribed by state law. Rules of that kind protect legitimate state interests in procedural regularity and discourage prisoners from "sandbagging" the state courts by deliberately withholding federal claims from the state courts and "saving" them for federal habeas corpus proceedings. In a long line of decisions reaching back to the Nixon Administration, the Supreme Court has developed a comprehensive set of rules for this purpose. Nothing in AEDPA changed those rules, presumably because no one thought they needed changing. So far as I am aware, there is no reason for making changes now.

As you know, the Court's existing rules forbid a federal court from entertaining a claim if the petitioner failed to present it properly in state court, if (for that reason) the state courts refused to consider it, if the state's procedural ground of decision would be adequate to foreclose direct review in the Supreme Court, and if the petitioner fails either to show "cause" for the default in state court as well as "prejudice" or to demonstrate that he or she is probably innocent. If there is fault to be found with the Court's rules, it is not that they are too generous, but just the opposite. They are extremely demanding and thus keep prisoners from pressing constitutional claims in *either* state court *or* federal court. Very few petitioners are able to clear all the hurdles set before them, and those who do genuinely ought to be able to advance their claims in federal court. Section 4 would raise the bar even higher—without any demonstrable need.

Over the years, Congress and the Court have often worked together in fashioning habeas corpus procedural rules that promise actually to work. That experience is nowhere clearer than here, with respect to procedural default in state court. I urge you not to sweep away dozens of Supreme Court decisions *en masse*—without data showing that there is something broken that needs to be fixed.

Section 4 is especially troubling in that it is drawn as a jurisdictional bar. It would strip federal courts of jurisdiction to consider a claim that a state court previously refused to entertain on the basis of some procedural error committed by the prisoner or his lawyer in state court. A

federal court would have to accept at face value a state court's decision that some state procedural rule established a procedural requirement, that the prisoner or his attorney failed to comply with that requirement, and that, in consequence, the state court declined to consider the prisoner's federal claim.

Section 4 would also eliminate federal court jurisdiction to consider an argument that the prisoner's procedural "default" in state court was attributable to his lawyer's ineffective representation in violation of the Sixth Amendment. The only exceptions would be for prisoners whose claims rest on "new rules" of law that have retroactive effect or on newly discovered evidence showing that the prisoner is innocent. There again, federal constitutional claims would be barred from *both* state and federal court, irrespective of their merit.

Section 4 would strip federal courts of jurisdiction to consider claims that a state court rejected on the merits, if the state court also explained that the prisoner committed procedural default by failing to raise the claim properly in state court. And it would deprive federal courts of jurisdiction to examine a claim that a state court was willing to review for "plain error"—unless the claim rests on a "new rule" of law that has retroactive effect or on newly discovered facts showing that the prisoner shouldn't have been convicted. Accordingly, a state court decision on a federal constitutional question would stand, irrespective of whether it is correct—except in cases in which the prisoner proves that he or she is actually innocent.

I understand there is concern that federal courts find some state procedural grounds of decision "inadequate" to forestall Supreme Court direct review and thus similarly insufficient to cut off federal adjudication of claims in habeas corpus proceedings. I urge you to consider, however, that you would only make the system more complex than it already is if you were to enact special rules governing the adequacy of state procedural grounds for habeas cases and thus force federal courts to set aside the body of Supreme Court decisions on which they now rely to determine "adequacy." When the Supreme Court began to tighten up the rules for default cases in the wake of the Warren Court, the first thing the Court did was to insist that the "adequate state ground" doctrine should be restored to habeas corpus just as it operates in cases on direct review to the Supreme Court itself. That was nearly thirty years ago in *Wainwright v. Sykes*, 433 U.S. 72 (1977) (opinion for the Court by Rehnquist, J.). Certainly if the idea is to "streamline" the process in habeas cases, it would hardly make sense to upset the symmetry the Court has created between habeas corpus and the Court's own appellate practice.

None of the changes that Section 4 would make would improve the capacity of our justice system to enforce federal constitutional rights in a procedurally fair and rational manner. I urge you to drop that section and, for now at least, to leave procedural default issues to be controlled by existing Supreme Court doctrine.

Q3. Under current law, the one-year period for filing a federal habeas petition is tolled when a prisoner is in state court attacking his or her conviction or sentence. Under section 5 of S.1088, the filing period is tolled only on a claim-by-claim basis; if a prisoner has already exhausted state remedies with respect to one claim and is in state court pressing another, the clock is running with respect to the first claim. Do you see any problems with this arrangement?

A3. Under Section 5 of S. 1088, if a prisoner filed a petition in state court containing a federal claim he or she meant to advance later in federal court, the one-year filing period would be tolled for that claim while the state application were pending—but not for other claims regarding the same criminal judgment. As your question suggests, that arrangement would be problematic.

The primary point of tolling the filing period while a petition for state postconviction relief is pending is to accommodate the exhaustion doctrine, which requires a prisoners to pursue available avenues for pressing federal claims in state court before advancing those claims in federal habeas corpus proceedings. Prisoners often have more than one claim, and it often happens that they exhaust state remedies with respect to different claims at different times. To take a common example, a prisoner might have a claim that the prosecutor exercised peremptory challenges to eliminate African Americans from the jury. If that claim is raised when the jury is being selected (as it should be), the trial court will conduct the appropriate hearing and make a record that will help the state appellate courts assess the claim. Then, once the claim is presented to the state's highest court on appellate review, the exhaustion doctrine has been satisfied and the prisoner can take the claim to federal court.

The same prisoner may have another federal claim that is not yet ready for federal jurisdiction. For example, there may be a claim that counsel provided constitutionally ineffective assistance by failing to track down alibi witnesses. That kind of claim typically cannot be considered on appellate review—both because it depends on factual circumstances that are not laid out in the record and because the attorney who is alleged to have performed ineffectively is still handling the case. A claim that counsel's performance was ineffective, then, must be advanced in state postconviction proceedings—after the conviction has been affirmed on appeal.

Once the prisoner files such a state postconviction petition, Section 5 would toll the one-year filing period for a federal petition with respect to the claim in the state petition, *i.e.*, the claim that counsel's work was ineffective, but *not* for a petition advancing the race discrimination claim that is already ripe for federal review (and thus is not included in the prisoner's state petition). Accordingly, the prisoner would almost certainly have to choose between the two claims. If the prisoner litigates the ineffective-assistance claim in state court and then goes to federal court, he or she will probably forfeit the chance to advance the race-discrimination claim—because, by then, the filing period for that claim will have run out. If the prisoner wants to pursue federal relief on the race-discrimination claim, he or she will have to file a federal petition fairly soon—before the ineffective-assistance claim is ready.

All this was understood when Congress adopted AEDPA. That is why the current provision, 28 U.S.C. § 2244(d)(2), states that an application in state court advancing one claim against a prisoner's conviction *judgment* suspends the filing period for a federal habeas petition advancing that claim and any other claims going to the same judgment. Accordingly, a prisoner who has already satisfied the exhaustion doctrine with respect to one claim (like the race-discrimination claim in my hypothetical) needn't worry that, if he or she goes to state court to press a different claim (like the ineffective-assistance claim in my hypothetical), the clock will

be stopped only for the claim in the state application and not for the claim that is ready for federal court.

I would like to direct your attention to another feature of Section 5 that is also problematic. The idea, as I understand it, is to toll the filing period only with respect to federal claims that are potentially cognizable in federal court. Under existing law, a petition for state postconviction relief tolls the federal filing period even if it contains only claims based on state law. That makes sense. If the state courts find a state-law claim meritorious and grant relief on that basis, there will be no need for federal courts to become involved at all. By insisting that a petition in state court can suspend the federal filing period only if it contains federal claims, Section 5 would frustrate an obvious means of reducing the number of federal habeas petitions.

Procedural rules for the processing of habeas corpus cases should make sense. They should facilitate the adjudication of federal claims so long as prisoners proceed as they should in both state and federal court. Section 5 would frustrate the adjudication of federal claims even when prisoners do everything they can to litigate all their claims as quickly and efficiently as possible.

Q4. Section 14 of S.1088 makes the provisions of the bill applicable to pending habeas corpus cases. How would that work in practice, and what possible litigation issues does it present?

A4. By making all of S. 1088's provisions applicable to cases that are already pending, Section 14 would certainly invite litigation. I urge you not to take that route.

In some circumstances, Congress *can* change the law governing cases after they are underway. But Congress rarely does that because it is often unfair, sometimes unconstitutional, and always confusing—which means, of course, that it invites litigation to clarify matters. By contrast, Congress typically acts prospectively—establishing law for future cases only. The Supreme Court, for its part, assumes that Congress does not mean to attach legal consequences to transactions made or adjudications undertaken in the past and thus reads legislation not to have that effect in the absence of exacting clarity on the point. Even then, in some instances, the Court concludes that applying new law retrospectively is fundamentally unfair and thus a violation of due process.

If you were to adopt habeas corpus provisions and make them all applicable immediately to pending cases, you certainly would invite litigation over whether you actually intend to legislate retroactively and, if you do, over whether the Constitution allows it. I will not try to predict the outcome of lawsuits over this sort of problem, because the jurisprudence in the area is extremely complex. I hasten to say, for example, that purely procedural changes are not thought to operate retroactively even if they are invoked immediately to pending cases. Still, it is hard to know what counts as a procedural change (as against a change in substantive law), and the only way to find the answer is to litigate the question.

Here again, you might follow your own lead in AEDPA, when you did not extend most of the new provisions of that Act to pending cases. By reaching only future cases, you avoided all sorts of problems that a provision like Section 7 would certainly create.

* * * * * * * * *

As I noted in my testimony, I firmly believe that S. 1088 would not improve the habeas process and would instead complicate the process, to the disadvantage of crime victims, innocent people charged with a crime, and others who have a valid interest in an expedited process. I also believe this to be true with regard to S. 1088 as amended by the Chairman's amendment.

The National Conference of State Chief Justices, at its recent national conference, adopted a resolution opposing the kinds of habeas proposals contained in these bills, urging that Congress not rush to judgment, and recommending that there be "additional study and analysis . . . to evaluate the impact of AEDPA to date and the causes of unwarranted delay, if any, including the availability and allocation of resources, and to consider appropriate targeted measures that will ameliorate the documented problems and avoid depriving the federal courts of their traditional jurisdiction without more supporting evidence."

As I stated to the Committee in my testimony and by follow-up letter, I would be happy to assist in such a study, and to make the resources of my law firm available. Until such a study is carried out, I believe that any action on S. 1088 or any other habeas legislation is premature, and I urge that the Committee not move forward on it.

Questions From Senator Mike Dewine
Presented to Seth P. Waxman
"Habeas Corpus Proceedings and Issues of Actual Innocence"

Q1. Please review the attached lists of cases submitted by Barry Scheck and discuss whether you agree or disagree with his assessment of how those cases would have come out under the Streamlined Procedures Act of 2005, S.1088.

A1. Time is short, and I have not been able to obtain the necessary materials to evaluate all the cases on Professor Scheck's list – particularly because in most of those cases, the crucial information is not published. I have no reason to question Professor Scheck's evaluations, but if it would assist you in addressing this bill I would be happy to look more closely at particular cases when I am able to devote the time required.

I can certainly say (on the basis of the information Professor Scheck has provided) that the cases on his list illustrate a disturbing pattern: Many criminal cases are not thoroughly investigated and litigated in state court *either* by state prosecutors or by defense counsel; the risk of erroneous convictions is real and persistent; and evidence tending to disprove a defendant's guilt often emerges later in federal court—sometimes because effective attorneys do the work that should have been done at trial, sometimes because new scientific evidence (like DNA test results) disproves "facts" on which the jury relied; and sometimes (as, for example, in the Banks case I discuss and the Amadeo case cited by Professor Scheck) because federal courts provide access to discovery denied in state courts that reveals shocking prosecutorial misconduct. Federal habeas is vitally important as an integral part of the criminal justice system, working in tandem with state proceedings to ensure that innocent citizens are not convicted and sentenced in error.

I fully agree with Professor Scheck that the death penalty cases he cites would be foreclosed by Section 9 of S. 1088 as that bill was originally introduced (provided the Attorney General approves a state's program for providing counsel to indigents in state postconviction proceedings). Section 9 would strip federal courts of jurisdiction in covered capital cases, subject to exceptions that are so narrow as to be ineffectual. I understand that the Senate Committee has adopted a substitute, offered by Senator Specter, which deletes Section 9. I certainly applaud that action. I believe, however, that an analogue of Section 9 remains in the House bill, H.R. 3035. Moreover, Senator Specter's substitute, while very much a step in the right direction, leaves in place two provisions that, in my judgment, will work particularly pernicious results – sections 2 and 4, which address default and exhaustion. Even as amended, those provisions will preclude review in many cases involving circumstances like those addressed in the previous paragraph.

As I noted in my testimony, I firmly believe that S. 1088 would not improve the habeas process and would instead complicate the process, to the disadvantage of crime victims, innocent people charged with a crime, and others who have a valid interest in an expedited process. I also believe this to be true with regard to S. 1088 as amended by the Chairman's amendment.

The National Conference of State Chief Justices, at its recent national conference, adopted a resolution opposing the kinds of habeas proposals contained in these bills, urging that Congress not rush to judgment, and recommending that there be "additional study and analysis . . . to evaluate the impact of AEDPA to date and the causes of unwarranted delay, if any, including the availability and allocation of resources, and to consider appropriate targeted measures that will ameliorate the documented problems and avoid depriving the federal courts of their traditional jurisdiction without more supporting evidence."

As I stated to the Committee in my testimony and by follow-up letter, I would be happy to assist in such a study, and to make the resources of my law firm available. Until such a study is carried out, I believe that any action on S. 1088 or any other habeas legislation is premature, and I urge that the Committee not move forward on it.

Q2. Please review the four cases cited by Seth P. Waxman in his testimony before the Committee on the Judiciary and discuss whether you agree or disagree with his assessment of how those cases would have come out under the Streamlined Procedures Act of 2005, S.1088.

A2. I continue to believe that my analysis of these four cases is accurate. If the Committee would like additional examples of cases decided by substantial majorities of the Supreme Court as to which, under S. 1088, the federal courts would lack jurisdiction, I would be happy to provide them.

SUBMISSIONS FOR THE RECORD

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July 13, 2005

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By fax: 202-224-3479
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Re: S. 1088 (Collateral Review in Capital Cases)

Dear Senators Specter and Leahy and Representatives Sensenbrenner and Conyers:

As someone who supports the death penalty but believes it is important to take every reasonable step to minimize the prospect of executing the innocent, I am writing to express very serious concerns about the provisions in S. 1088 regarding collateral review in capital cases. First, let me explain the reasons for my interest in this legislation.

I am a business litigator at a large commercial law firm. I have been involved in several death penalty cases and spent a considerable amount of time attempting to recruit lawyers from other firms to volunteer to handle these cases pro bono. Between 1992 and 1997, I led the team that ultimately obtained the release from death row of Ricardo Aldape Guerra. The federal courts (in a decision unanimously affirmed by the Fifth Circuit) and the state courts both found that Mr. Aldape Guerra was innocent and had been the victim of police and prosecutorial misconduct after eight or nine witnesses testified about such things as extensive witness intimidation, forced signing of false affidavits, forced perjury at trial, and failure to disclose material exonerating evidence. A federal district judge, an appointee of President Reagan, after a lengthy evidentiary hearing, described this misconduct:

> Here, the extent of the prosecutorial misconduct is legion. . . . There is no doubt in this Court's mind that the verdict would have been different had the trial been properly conducted. . . .
>
> The police officers' and the prosecutors' actions . . . were intentional, were done in bad faith, and are outrageous. These men and women, sworn to uphold the law, abandoned their charge and became merchants of chaos. . . . Their misconduct was designed and calculated to obtain a conviction and another 'notch in their guns' despite the overwhelming evidence that [another man] was the killer and the lack of evidence pointing to [Aldape] Guerra.
>
> The police officers and prosecutors were successful in intimidating and manipulating a number of unsophisticated witnesses, many mere children, into testifying contrary to what the witnesses and prosecutors knew to be the true fact[s] . . . .

I have two concerns about S. 1088. First, it would make recruiting volunteer lawyers to handle capital habeas cases much more difficult, if not impossible. Second, it would make it extremely difficult to obtain a hearing in cases like that of Aldape Guerra and increase unacceptably the risk of executing the innocent.

The problematic feature of section 9 is the procedure that eliminates federal court jurisdiction in death penalty cases except for prisoners who raise claims based on a retroactive new rule of law and those who offer clear evidence of actual innocence based on newly discovered evidence. If this provision had applied to Aldape Guerra's case, my client would have been executed long ago. He raised no new rule of law, just the time-honored principle that everyone deserves a fair trial. He offered evidence that was not new but required considerable resources and effort to uncover. In far too many cases, the facts underlying the claim are available for discovery but require competent counsel to discover them. Without adequate compensation and with procedural roadblocks that deter competent volunteers, it is far too difficult to find those lawyers. I have never seen a case where someone failed to raise a claim for strategic reasons after uncovering facts that gave rise to a constitutional violation and provided clear proof of innocence. But it requires competence and some tenacity to obtain that proof.

No one of good will wants to execute the innocent. If someone innocent has a persuasive case of a constitutional violation but cannot make that case because of incompetent or inadequately compensated counsel, it would be a tragedy if the law prevented subsequent counsel from even raising the issue. If that occurs, the innocent will be executed and the guilty will remain free to kill again. Surely none of us wish that to occur.

I hope that you will reject or substantially modify S. 1088.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

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Don't make the death penalty easier - end it

The star's view: At a time when the American public is growing more queasy about the death penalty, Arizona Sen. Jon Kyl wants to limit the appeals process.

Given recent revelations of an imperfect justice system that wrongfully sends people to death row, we find it incredible that Arizona Sen. Jon Kyl wants to put people to death faster.

Kyl, a Republican, has introduced the euphemistically named Streamlined Procedures Act of 2005 in the Senate. The bill would limit the number of times a defendant could have the case reviewed before execution. The legislation has been introduced in the House by Rep. Dan Lungren, R-Calif.

It is expected to win wide approval in the House, where supporters see the checks and balances in the process as a manipulation of the system. This legislation would speed up the execution process and allow Congress to tell constituents it is tough on crime.

Capital punishment is one of those cultural wedge issues on which opposing sides may never agree. Some see it as punishment for the ultimate crime. Others see no justice when punishment is as barbaric as the crime.

Yet we have to ask why, while at war fighting terrorism at home and abroad, our elected officials are reaching for the political margins to find issues that will divide the country.

In fact, there are plenty of reasons why this "get tough with the death penalty" proposal should be turned down. The most compelling is recent evidence that prosecutors have put innocent people on death row.

What's more, public opinion, slowly, is turning away from capital punishment. We have no doubt that the death penalty will become a thing of the past, along with such other historical artifacts as lynchings, slavery and witch hunts.

Even the U.S. Supreme Court has been chipping away at capital punishment. It once was acceptable to put to death retarded defendants. And until recently, it was acceptable for states to impose the death penalty on teenagers. Both are now widely accepted as wrong.

Advocates of the death penalty should ask themselves why the American people would want to restrict judicial oversight for only those on death row. At what point will lawmakers like Kyl and Lungren decide to write legislation to shortchange people convicted of other crimes?

We have learned over the past couple of years of waning death-penalty enthusiasm that prosecutorial zeal and resources are no match for overworked, inexperienced and often incompetent defense attorneys. Cases have been sent back to the trial courts, for example, where attorneys slept during the trials.

And prosecutors have gone to appeals courts asking to put to death a man whose sanity was determined by his medication. When off his medication, the man was insane. But when on, he was considered sane. The prosecutors wanted the judge to order the defendant forcibly medicated so he could be executed.

The legislation that Kyl and Lungren have introduced would serve to degrade an already imperfect method for putting people to death. They would deny appeals because the process takes too long. But time is exactly what is needed to make sure that if people are sent to their deaths, we are sure they are guilty. According to the Death Penalty Information Center, the average time on death row for defendants who were eventually acquitted was 9.3 years.

We wonder whether Americans really want legislation that chips away at a judicial process that is supposed to protect us all. Kyl and Lungren are going against changing public opinion on this issue. This is not a time to make it easier to put people to death. It is a time to end capital punishment altogether.

- M.H.

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July 20, 2005

Via facsimile 202-224-9516

The Honorable Patrick J. Leahy
Ranking Minority Member
Senate Judiciary Committee
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Washington, DC 20510-6275

Re: The Streamlined Procedures Act (S. 1088)

Dear Senator Leahy:

I write to express concern regarding claims made by U.S. Sen. Jon Kyl regarding S. 1088. The statements were contained in an op-ed piece published in the Arizona Daily Star newspaper this week. I respect Sen. Kyl and since one of his sons-in-law is a long time friend of mine I hesitate to criticize his position. However, the stakes are too high to remain silent.

As you are aware, S. 1088 seeks to severely limit the federal courts' ability to fully review habeas corpus cases involving state prisoners. In his column, Senator Kyl alludes generally to delays in habeas corpus cases, and he specifically cites the case of Donald Beaty as an example of unwarranted delay.

Mr. Beaty was convicted and sentenced to death for the murder of Christy Fornoff. After his conviction and death sentence, Mr. Beaty pursued the appeals available to any person convicted of a crime in the Arizona state courts. The state courts denied relief, and he timely sought federal court review of his state conviction and sentence.

Senator Kyl decries the seven-year period this particular case was litigated and reviewed by a federal district court judge. However, Senator Kyl omits some important facts. For example, during the first four years the parties litigated issues raised by Mr. Beaty, neither the state nor the defense objected to the course of the litigation. During the balance of this seven-year "delay," the litigants were awaiting the judge's decision.

Senator Kyl does not mention that the federal judges in the District of Arizona, including the judge in Mr. Beaty's case, have heavy dockets and workloads. The District of Arizona encompasses the entire state, and the judges preside over a wide variety of cases, including immigration, drug-related crimes and crimes that occur on the state's sprawling Indian reservations. This is in addition to run-of-the mill civil and criminal cases.

Moreover, the federal judge who presided over the Beaty case also presided over a protracted and complex criminal trial involving Arizona's former governor. Senator Kyl describes the delay in this case as decades long. However, he conspicuously does not explain that the court of appeals reversed, in part, the district court's decision and remanded the case for an evidentiary hearing on constitutional violations that occurred in the case.

Senator Kyl ignores the significant constitutional issues pending in Mr. Beaty's case. For example, evidence has been uncovered that the key witness who testified against Mr. Beaty, Angel Bello, may be the true perpetrator of this crime. Known to the prosecution but not disclosed to the defense at trial was the fact that Bello – who lived in Mr. Beaty's apartment immediately prior to Beaty – had been convicted of attempted rape. When his intended victim resisted, Bello attempted to strangle her. Christy Fornoff, whom Beaty was convicted of raping and murdering, was also asphyxiated. The prosecutor also failed to disclose to the defense that Bello was a prime suspect in the rape and asphyxiation of yet another girl, Tina Reed.

It's true that some of the delay in Mr. Beaty's case is inexplicable. However, the Arizona District Court has already adopted new procedures that shorten the time the court has to review a case. As a result, there is no reason to amend or rewrite the habeas statutes based on one case, and on a problem that has already been corrected.

I do not come to this debate as simply a lawyer who concentrates his practice in the area of criminal defense. For more than twelve years I served as a prosecutor, first as a deputy Pima County attorney, then First Assistant U.S. Attorney and finally as U.S. Attorney for the District of Arizona. I had a reputation as tough but fair prosecutor. I have also been employed as a policeman while in law school and learned first hand that mistakes are made by police officers even those acting in good faith. As a prosecutor I also learned that despite one's best efforts the position being advanced by the government was not always correct. Prosecutors

sometimes forget that their job is to seek justice and even when doing so are not without error. Attempts to limit habeas corpus cases to state prisoners will do nothing to enhance our criminal justice system if our intent is to do justice. Also there are so many other changes which could occur to our justice system which would speed up the ultimate search for truth and justice and which would better protect our citizens in the process. Unfortunately, S. 1088 neither serves the search for truth and justice nor does it protect our citizens.

Very truly yours,

FENNEMORE CRAIG, P.C.

A. Bates Butler III

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State of California

Memorandum

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To : MR. JOE MATAL
Judiciary Committee
United States Senate

Date : July 12, 2005

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From : Ward A. Campbell
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Office of the Attorney General - Sacramento

Subject : SB 1088 (Kyl) and HR 3035 (Lungren)

You have asked for observations and information regarding SB 1088 (Kyl) and HR 3035 (Lungren). Although our office has not taken a formal position on these bills, I hope this will give you some background and technical perspective. We are continuing to study these proposals. Please let me know if you need more information.

Preliminary Observations

Both of these bills build on rules and premises that have long been the foundation of habeas corpus law and jurisprudence. As Justice Blackmun observed in *McFarland,*, the state trial is the "main event." *McFarland v. Scott*, 512 U.S. 849, 859 (1994). Once a state court judgment is final on state appeal, it is presumed final and legal. Federal habeas review is secondary and limited–not a legal entitlement. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). It was not the intent of Congress that federal courts should control state criminal prosecutions. *Ex parte Royall,* 117 U.S. 241, 251 (1886). The main objective is to ensure that state prisoners litigate claims in the forums most suitable, state courts. *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 10 (1992). Those claims should be raised in the proper procedural manner and should all be raised ("exhausted") before relief is sought in federal court. As Justice Sandra Day O'Connor explained in *Rose v. Lundy*, 455 U.S. 509, 519 (1982) the "straightforward" exhaustion doctrine "provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court."

State and federal courts are co-equal partners in the enforcement of our Constitution. *Royall*, 117 U.S. at 251-252 (1886); *Sawyer v. Smith*, 497 U.S. 227, 241 (1990); *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The "scope of the writ" has never been denied "simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error....Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review." *Teague v. Lane*, 489 U.S. 288, 308 (1989). State courts carry out their Constitutional responsibilities through the administration of their trial, direct review, and collateral review systems. Nothing in this proposal hinders a defendant's ability to raise and

litigate all claims in state court, whether by trial, appeal, or collateral review.

Section 2-Mixed Petitions

Under current law, an applicant is required to exhaust available state remedies before raising any federal claims in federal court. The State bears the burden of determining whether any claims are unexhausted. If a habeas petition contains both exhausted and unexhausted claims, the district court must either dismiss the petition or has the discretion to stay the federal case while the unexhausted claims are litigated in state court. *Rhines v. Weber*, _U.S._, 125 S.Ct. 1528 (2005).

This proposal makes a number of procedural changes to how district courts handle mixed petitions. In particular, this proposal explicitly requires that the federal claim be raised with specificity in state court so that the state court will have a full and fair opportunity to consider the claim. Over the years, there has been much litigation over how specific the claim should be to put the state court on notice of the federal claim.

This proposal also makes the logical change of shifting the burden to the applicant to identify the claims exhausted in state court rather than requiring the State to search the record for unexhausted claims. The applicant should be in a far better position than the State to quickly and efficiently explain when, how, and where claims were exhausted in state court. This requirement also promotes total exhaustion.[1]

This proposal also attempts to end the "ping pong" delay that occurs between state and federal claims due to mixed petitions–when cases are bounced back to state court exhaustion. An unexhausted claim will be considered only if it meets the standards for an evidentiary hearing in section 2254(e)(2).[2]

If amended, this section will end the delay caused by dismissing mixed petitions or staying

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[1]The proposal could be improved by making it explicit that if an applicant fails to identify a claim as exhausted, that it will be presumed that the claim is unexhausted.

[2]As currently drafted there is an ambiguity in the bill since it could be read as indicating that if a petition includes only one unexhausted claim that meets the standards of 2254(e)(2), that the entire petition could still be considered even if it contains other non-qualifying unexhausted claims. This requires a technical amendment to limit the district court's consideration solely to properly exhausted claims and any claims that meet the 2254(e)(2) standards. I understand that such language is being considered.

cases pending exhaustion. This proposal will render unnecessary the litigation over stays which the United States Supreme Court was compelled to adopt in *Rhines*. The concession to permitting unexhausted claims that meet the requirements of section 2254(e)(2) is a safety valve against any genuine injustices arising from the total exhaustion rule.

It is not surprising that 2254 (e)(2) should be used as a backstop for any potential miscarriages of justice due to unexhausted claims.. It has served that purpose in AEDPA since 1996 for evidentiary hearings and successive petitions. There is no reason wny it should not be applied elsewhere. An applicant will still benefit from any new rules of constitutional law that affect the fundamental fairness and reliability of a criminal proceeding or render the applicant immune from a particular sentence or punishment. The so-called "actual innocence" exception is the standard for showing "miscarriages of justice" for death penalty eligibility as first set forth in *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) and as then adopted as part of the AEDPA.

Section 3-Amendments to Petitions

Generally speaking, current law requires federal habeas petitions to be filed within one year after direct review in state court is final. This section deals with amendments to habeas corpus petitions after the period of limitations has expired. Under current law, amendments to habeas corpus petitions are governed by the same rules that govern run of the mill civil cases. Under that law, habeas corpus petitions may be amended even after the period of limitations has run if the new claim "relates back" to a claim with the same "common core of operative facts." *Mayle v. Felix*, _U.S._ (2005). Of course, under this rule, there is still litigation over what constitutes a "common core of operative facts" and there are still amendments after the period of limitations has run.

This proposal recognizes that habeas corpus petitions cannot always be treated the same way as routine civil cases. This proposal gives an applicant one opportunity to amend a petition. The amendment must occur either before an answer is filed or the one year period of limitations has run, whichever is earlier. Once again, as a safety valve, amendments are allowed if the new claims meet the standard for a successive petition under 2244(b)(2).[3]

Understandably, in contrast to regular civil litigation, there is no reason for allowing amendments to petitions after the period of limitations has run. Habeas corpus litigation in federal court occurs only after a complete state trial, state appeal, and state habeas corpus proceeding in which all claims should be known and exhausted. It is not a civil case that is

[3]This is a counterpart to the exceptions in 2254(e)(2).

simply starting from scratch. Absent unusual circumstances, such as those set forth in section 2244(b)(2), there should be no reason to allow untimely amendments.

Section 4-Procedurally Defaulted Claims

A habeas petitioner commits a "procedural default" when he or she fails to raise a claim or make an objection at the appropriate procedural time under state law or federal law . These omissions ordinarily occur when a defendant fails to make a contemporaneous objection at trial, raises a claim on habeas should be raised on appeal, or delays in seeking habeas relief. Since "procedural default" goes directly to the dignity and sovereignty interests of the state in its own judicial proceedings, it is an intensely litigated phase of federal habeas. It has been a constantly evolving area of the law since 1891. *See Fay v. Noia*, 372 U.S. 391, 424 (1963).

Under current law, a federal district court will not consider a claim that was not properly raised under state procedure (the "procedural default" doctrine). Thus, for instance, if a state court rejected a federal claim on grounds that the claim was raised at trial due to the defendant's failure to object, the district court will ordinarily not consider that claim. The exception to this rule is that if an applicant shows "cause" for the failure to raise the claim and "prejudice" from the asserted error, the federal court will consider the claim. Alternatively, if an applicant produces evidence of "actual innocence", the district court will consider the claim.

The applicant may also avoid the procedural default rule if the court finds that the state court does not regularly apply the procedural rule or if the procedural rule actually required some consideration of the Constitutional merits of the claim or if the rule is otherwise not "adequate" to bar the claim. However, the exact contours of this method of avoidance are also undefined. *Dugger v. Adams*, 489 U.S. 401, 410 fn. 6 (1989) (even though Florida did not apply procedural default rule in a "few" cases, that did not mean it was not otherwise applying the rule regularly).

This proposal defines the procedural default doctrine by precluding federal courts from considering claims that were rejected by state courts as "procedurally barred" even if the state court separately denies the claim on the merits. There is no point to a federal court reviewing a merits disposition if it has been mooted by an alternative procedural rejection. *Lambrix v. Singletary*, 520 U.S. 518, 522-523 (1997) The court will also not be able to consider the claim if it is raised as a claim of ineffective assistance of counsel. Ineffective assistance of counsel claims about every single failure to object may frequently be backdoor ways of litigating defaulted claims on the merits. In particular, this provision will end the practice of using ineffective assistance of counsel claims to litigate the admission of

evidence that actually proved the defendant's guilt. *See Kimmelman v. Morrison*, 477 U.S. 365, 397-398 (Powell, J. conc.) (ineffective assistance of counsel should not be raised for failure to object to evidence of guilt that was seized in violation of the Fourth Amendment).

Finally, the district court will not be able to review a claim denied for procedural grounds in state court even if the state court has exceptions for its procedural default rule based on the serious nature of the alleged error. The proposal eliminates the current "cause and prejudice" exception for procedural defaults. The only exceptions to the "procedural bar" rule in this proposal are for claims defined under 2254(e)(2) or if the State expressly waives the procedural bar. In addition, district courts will be required to determine the procedural bar issues before requiring the State to answer any such claims on the merits. *Lambrix* 520 U.S. at 522-523 (procedural default ordinarily considered first). To the extent that a state court order is unclear as to which claims were denied on procedural grounds, the district court will be required to examine the entire state court record to resolve the ambiguity. Finally, to the extent that the court does reach the merits of a claim the state court denied on procedural grounds, the district court can only grant relief under the standards of 2254(d).

The significance of this proposal must be viewed against a certain backdrop. Both the state criminal system and the federal justice system have procedural bars. The procedural default rule involves a fundamental principle of our criminal justice system. "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." United States v. *Olano*, 507 U.S. 725, 731 (1993) quoting *Yakus v United States*, 321 U.S. 414, 444 (1944). Thus, the procedural default doctrine with its exceptions was not erected to impede applicants, but to actually provide an opportunity for them to raise claims they forfeited due to their failure to make timely objections in state court.

The United States Supreme Court has candidly declined to give "precise definition" to its own procedural rules. *Wainwright v. Sykes,* 433 U.S. 72, 88, 91 (1977); *United States v. Frady*, 456 U.S. 152, 168 (1982) (import of the meaning of "prejudice" in other cases "remains an open question"); *Engle v. Isaac*, 456 U.S. 107, 134 (1982) ("cause and prejudice" are not "rigid concepts"); *Reed v. Ross*, 468 U.S. 1, 13 (1984)("this Court has not given the term "cause" precise content...Nor do we attempt to do so here."); *Murray v Currier*, 477 U.S. 478, 484 (1986); *Smith v. Murray*, 477 U.S. 527, 533 (1986)("We have declined in the past to essay a comprehensive catalog of the circumstances that would justify a finding of cause."); *McCleskey v. Zant*, 499 U.S. 467, 477, 489 (1991) ("confusion" about abuse of the writ, "our decisions on the subject do not all admit of ready synthesis"). For that matter, the federal rule that habeas could not be used as a substitute for appeal in federal criminal cases was also subject to undefined exceptions. *See, e.g. Sunal v. Large,*

332 U.S. 174, 177-178 (1947).

Even the 'cause and prejudice" test itself replaced a different rule–the far more forgiving "deliberate bypass" standard. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-6 (1992) (rejecting "deliberate bypass" rule in cases in which applicant failed to develop factual record in state court). Similar to its treatment of "cause and prejudice', the Court has declined to define the meaning of the "plain error" rule beyond what is necessary for a particular case. *Olano*, 507 U.S. at 732; *Johnson v. United States*, 520 U.S. 461, 467 (1997).

California's experience, for example, paralleled the United States Supreme Court's experience with procedural default. California long required state habeas applicants to explain significant delay in seeking relief and forbade litigation of claims that were or should have been raised on appeal. The California Supreme Court noted that these bars had been described as "discretionary" and as "policies". The state court acknowledged that its decisions had suggested there were "undefined exceptions" to the bars and "uncertainty". *In re Clark*, 5 Cal.4th 750, 768 (1993). Similarly, in terms of the procedural bar for claims that should have been raised on appeal, the exceptions had not "always been clear." *In re Harris*, 5 Cal.4th 813, 830 (1993). The California Supreme Court has articulated exceptions to its longstanding rules against belated petitions and repetitive claims for newly discovered claims, new rules, and actual innocence. *Clark*, supra; *Harris*, supra. With experience, the state court has also refined those standards. *In re Robbins*, 18 Cal.4th 770 (1998); *In re Gallego*, 18 Cal.4th 825, 842 (1998); *In re Sanders*, 21 Cal.4th 697 (1999); *In re Seaton,* 34 Cal.4th 193 (2004).

What is clear is that both the United States Supreme Court and the California Supreme Court have tried to balance "the state's weighty interest in the finality of judgments in criminal cases with the individual's right-also significant- to a fair trial under both the state and federal Constitutions." *Harris*, 5 Cal.4th at 830. Both courts have acted consistently with the notion that "[a] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with ... the rules of fundamental justice..." *Olano*, 507 U.S. at 732 quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). As the United States Supreme Court explained when it "attempt[ed]" to define its successive petition rule with "more precision": "Our discussion demonstrates that the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions. Because of historical changes and the complexity of the subject, the Court has not 'always followed an unwavering line in its conclusions as to the availability of the Great Writ.'" *McCleskey*,. 499 U.S. at 489 quoting *Fay v. Noia*, 372 U.S. 391, 411-412 (1963). Similarly, in defining procedural default rules, both the federal courts and California

avoided "sweeping language going far beyond the facts of the case eliciting it..." and chose not to "paint with a [] broad brush." *Wainwright*, 433 U.S. at 87-88 & fn. 12.

Federal and state courts are co-equal. *Sawyer v. Smith*, 497 U.S. 227, 241 (1990). The United States Supreme Court has explained that federal and state procedural defaults should be given similar effect. See *Reed v. Farley*, 512 U.S. 339, 354 (1994); *Francis v. Henderson*, 425 U.S. 536, 542 (1976).

Yet, while the federal rules have had the luxury of evolving case-by-case, California's procedural default rules have been disregarded by federal courts as inadequate, not regularly applied, or non-independent of federal Constitutional grounds. For instance, after the California Supreme Court's *Clark* decision reiterating the procedural default rules for delay and successive petitions, the Ninth Circuit held that it would not require pre-*Clark* applicants to have complied with California's procedural rules for timely petitions that may not have been consistently enforced. *Siripongs v. Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994); *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996). Similarly, the Ninth Circuit relied on California's *In re Harris* case to hold that the applicant did not need to conform with the California rule that state habeas cannot be used to raise issues that should have been raised on state appeal. *Fields v. Calderon*, 125 F.3d 757 (9th Cir. 1997). The burden of establishing the regularity and adequacy of state procedural bars has been placed on California, but the Ninth Circuit declined to explain how this burden would be met. *Bennett v. Mueller*, 322 F.3d 573, 583-586 (9th Cir. 2003). It is unclear that California can demonstrate that its procedural defaults are sufficiently adequate to bar further federal review. See, e.g. *Dennis v. Brown*, 361 F.Supp.2d 1124 (N.D. Cal. 2005). In reaching these decisions, the Ninth Circuit ignored that California had always required timely filing of petitions and prohibited substituting habeas for appeal, not to mention the less than unwavering" development" of federal procedural rules. Yet, there has never been any question that California prisoners were on notice of these basic requirements no matter what exceptions might apply. See, *Barrientes v. Johnson*,221 F.3d 741, 760 fn. 12 (5th Cir. 2000); *Dusseldorf v. Teets,* 209 F.2d 754, 756 (9th Cir. 1954); *Van Geldern v. Field*, 498 F.2d 400, 402-403 (9th Cir.1974).[4]

As on judge has observed about this type of "electronmicroscope" analysis: "[I]t approaches its procedural bar analysis with an apparent set of presumptions which I find unacceptable:

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[4]Ironically, the Ninth Circuit had previously had no problems accepting and understanding California's procedural defaults. *See, e.g. Dusseldorf v. Teets,* 209 F.2d 754, 756 (9th Cir. 1954); *Van Geldern v. Field*, 498 F.2d 400, 402-403 (9th Cir.1974) (indicating that it understood reasons California Supreme Court used to excuse delay in seeking habeas relief).

that the state courts are not faithful to their own rules, and are seemingly unaware of how to apply them; and, that we ought to strain to permit federal habeas review and avoid finding procedural bar on state grounds. In my view, the presumptions must be exactly the opposite. Rather than going out of the way to imagine fatal defects in state cases so as to deny state courts the privilege of applying their own procedural bar rules, I would accord a presumption of regularity to state court applications of state rules." *Gutierrez v. Moriarty*, 922 F.2d 1464, 1474 (10th Cir. 1991) (Anderson, J. dis.).

Given their unsteady history, it is doubtful that federal procedural defaults would be found adequate or regularly applied under the standards federal courts apply to state procedural defaults. This bill would end the "double standard" between federal and state procedural default rules. State and federal rules would be given like effect. There would be no more digressive inquiries into adequacy, regularity, or independence. *See, e.g. Dugger*, 489 U.S. at 410. A "safety valve" remains in place for claims meeting the standards of section 2254(e)(2). It preserves the the state trial court as the "main event". *McFarland v. Scott*, 512 U.S. 849, 859 (1994). State processes remain the primary avenue for relief while federal courts maintain an important, but "secondary and limited" role. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). State proceedings will not be a mere "tryout on the road". *Wainwright*, 433 U.S. at 90. Finally, states will not be forced to consider imposing rigid, hard and fast procedural rules that admit to little or no discretion to do justice in an individual case because of the ripple effect on the integrity of its entire appellate and habeas process. *Robbins*, 18 Cal.4th at 778 fn. 1; *Prihoda v. McCaughtry*, 910 F.2d 1379, 1384 (7th Cir. 1990) ("[S]tates would be induced to make their rules draconian rather than to allow prisoners the latitude now available.")[5]

Section 5-Tolling of Period of Limitation

Ordinarily, applicants have one year to file a habeas corpus petition after their convictions are final on state court review. That period of time is tolled when a application for post conviction relief is pending in state court. Equitable tolling is frequently allowed for reasons not contemplated by section 2244(d).

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[5]Section 4 as drafted takes into account procedural default systems that are based on "plain error, fundamental error, or under a similarly heightened standard of review...." Obviously, no statute can list all the synonyms for this type of review and I read "similarly heightened" as embracing such standards as "fundamental miscarriage of justice" or the "fundamental jurisdiction" labels used in California.

This proposal clarifies that the one year period is tolled only when the applicant is actually litigating claims in state court that the applicant intends to raise in federal court, rather than an application regarding claims that have no relation to any federal claims.

This proposal also eliminates a tremendous source of delay by tolling in California. Presently, applicants for state habeas in California apply for relief to the trial court, the intermediate appellate court, and the state supreme court. Each court has original jurisdiction. The United States Supreme Court has held that generally the time for filing a federal petition can toll for the entire time that a state applicant is pursuing relief in the three courts, including the time intervening between the denial of the petition in one court and the filing of a new petition in the next higher court. *Carey v. Saffold*, 536 U.S. 214 (2002). In other words, the time will toll even when no petition is actually before any court for litigation or decision. As a result, there is litigation over whether an applicant has delayed too long in seeking relief in the various courts. *Gaston v. Palmer*, 387 F.3d 1004, 1018 (9th Cir. 2004) (implying that intervals less than 4 years between filings would count towards tolling) *Chavis v. Lamarque*, 382 F.3d 921 (9th Cir. 2004)(cert. granted May 2, 2005) (3 year delay between filing in intermediate court and California Supreme Court tolled period of limitations); *Saffold v. Carey*, 312 F.3d 1031 (9thCir. 2002) (4 ½ month delay between filings); *Sylvester v. Garcia*, 2003 WL 22701221 (9th Cir. 2003) (22 month interval); *Newman v. Early*, 2003 WL 21378590 (9th Cir. 2003) (11 month interval) . Furthermore, this tolling windfall promotes last minute filings of state habeas petitions in California just before the period of limitations has run. See, e.g. *Nino v. Galaza*, 183 F.3d 1003, 1006-1007 (9th Cir. 1999) (files first state habeas petition 314 days after period of limitation has started running). This proposal ends that uncertainty by explicitly stating that the time intervening between the denial of relief by one court and the filing in another will not count towards tolling the period of limitation.

The bill makes explicit that the period of limitation is only tolled for the reasons explicitly set forth in section 2244(d), i.e. no "equitable tolling". This proposal eliminates unnecessary, burdensome, and digressive litigation concerning allegations involving claims of denial of access to materials, missing materials, prison transfers, medical problems, prison lockdowns, prison libraries, and receipt of mail. . See, e.g. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (materials); *Martin v. Soares*, 223 F.3d 710, 715-716 (10th Cir. 2000); *Rhodes v. Senkowski*, 82 F.Supp.2d 160, 169-170 (S.D.N.Y. 2000) (medical treatment); *Ashker v. McGrath*, 2003 WL 22098001 (9th Cir.2003) (claimed lawyer deliberately missed deadline to avoid paying back a loan and that medical problems stemming from being shot during a fight hindered filing even though petitioner had filed five other petitions and several lawsuits); *Howell v. Roe*, 2003 WL 403353 (N.D. Cal. 2003) (incompetence rejected since applicant filed other state pleadings); *United States v. Battles*, 362 F.3d 1195 (9th Cir. 2004) (did not need to wait for counsel's files to prepare

timely petition); *Cook v. Stegall*, 295 F.3d 517 (6th Cir. 2002) (broken copier); Paige v. United States (delay in mail from brother in another prison); *Akins v. United States*, 204 F.3d 1086 (11th Cir. 2000) (library access, lockdowns, lost transcripts during five year period); *Hiivala v. Wood,* 195 F.3d 1098, 1106 (9th Cir. 1999) (gunshot wound and prison transfers). Since a federal petition follows all state court proceedings, there should be no reason for delay in filing the petition within one year of the time the state case is final on direct review unless the State has unconstitutionally impeded that filing, a new retroactive Constitutional right is available, or there is newly discovered evidence that could not have been uncovered earlier through due diligence.

Section 6-Harmless Error in Sentencing

Currently, a state court's finding of harmlessness or non-prejudice relating to a constitutional error or claim at sentencing is reviewed by a federal court under the "reasonableness standard" of section 2254(d). If the federal court finds the state court's decision unreasonable, it will review the error itself for harmless error.

Under this bill, the federal court would only review the state court's decision that a sentencing error was "trial error" subject to harmless error analysis. If the federal court concludes that the error was actually "structural error", it will then vacate the sentence since no prejudice analysis is necessary.

This provision recognizes that determining whether an error at sentencing was harmless, especially in a penalty phase of a capital case, carries a greater subjective element than analyzing error regarding the fact-based issues of guilt and innocence.

For instance, the Ninth Circuit has explained: "The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability. Presumably the imposition of a death sentence is entrusted to a jury because it is a uniquely moral decision in which bright line rules have a limited place." *Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995) (reversing penalty phase for ineffective assistance of counsel); see also *Sawyer*, 505 U.S. at 345-346 (comparing relative ease of determining factual question with "far more difficult task" of assessing affect of additional mitigating factors in penalty phase).

A harmless error determination regarding sentence is more in the nature of a normative or moralistic judgment. Viewed in this light, a federal court's assessment of prejudice does not have any inherent advantages in terms of reliability over the state court's review of the

sentencing error. There is nothing intrinsic about federal review of harmless error that renders its review superior to the analysis done by state courts. Frequently, these cases boil down to subjective disagreements between two sets of judges about how a particular error could or might have affected a jury or court. As opposed to review of error relating to factfinding, the quality of this quantity of repeated review could be questioned.

For examples of disagreements between the federal courts and state courts over sentencing error see e.g. *Belmontes v. Calderon*, 359 F.3d 1079 (9th Cir. 2004) (Callahan, J. dis.) cert.granted and remanded 125 S.Ct. 1697 (2005) (instructions); *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003) overruled by *Brown v. Payton,* 125 S.Ct. 1432 (2005) (instructions); *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004) cert. granted 125 S.Ct. 1700 (2005) (instructions); *Sandoval v. Calderon*, 231 F.3d 1140 (9th Cir. 2000) (misconduct); *Visciotti v. Woodford,* 288 F.3d 1097 (9th Cir. 2002) reversed and remanded *Woodford v. Visciotti,* 537 U.S. 19 (2002)(ineffective assistance of counsel); *Mayfield v. Woodford,* 270 F.3d 915 (9th Cir. en banc 2001) (ineffective assistance of counsel); *Morris v. Woodford*, 273 F.3d 826 (9th Cir. 2001) (instructions); *Coleman v. Calderon*, 210 F.3d 1047 (9th Cir. 2000) (instructions); *Wade v. Calderon*, 29 F.3d 1312 (9th Cir. 1994) (ineffective assistance of counsel); *Hamilton v. Vasquez*, 17 F.3d 1149 (9th Cir. 1994) (instructions).

Section 7-Unified Review Standard

The United States Supreme Court interpreted only Chapter 154 of the AEDPA as applying to pending cases. All non-capital cases and other capital cases not covered by Chapter 154 which were pending when the AEDPA was enacted were not subject to its provisions.

This provision ends this senseless distinction by making the AEDPA apply to all cases, including those which were pending before the AEDPA's enactment. Given the longevity of capital cases, this is not necessarily an insignificant number of cases. Furthermore, older cases which have been remanded back and forth several times over the last decade would also be affected.

Section 8-Appeals

Current law sets no time frames for the consideration of habeas appeals. If a petition is granted by the district court, the State frequently has to seek a stay of the judgment pending appeal so that the local authorities are not compelled to retry or release an applicant before the appeal has been decided. For successive petitions, circuit courts still call sua sponte for rehearings on denials of authorizations for successive petitions and applicants still file petitions for writs of certiorari after denials of authorizations for successive petitions.

My information on these occurrences is largely limited to my experience in capital cases. The most noticeable delay has been the amount of time between panel decisions affirming the denial of a writ and the decisions denying rehearing. The delay has been anywhere from eight months to several years for some of these cases. A comparative survey of other circuits with on-line dockets shows a turnaround time of usually no more than 2-3 months. In addition, over a year may transpire between oral argument and the initial panel decision. Finally, it has been a source of frustration that appellants file oversized briefs and then are given more time to reduce the sizes of those briefs–thus further delaying the case.

Certainly for capital cases, this bill will help streamline the time frames for the delays involved in acting on rehearing petitions. Those petitions normally concentrate on a few issues which have already been considered and rejected by the panel and district court as well as the state court. In particular, it does not seem unreasonable to place a deadline on the consideration of rehearing petitions.

In general, it does not seem unreasonable to streamline the appellate process for habeas appeals. By the time a federal habeas case has reached the appellate level, it has already been passed on and considered by numerous courts. If there is to be a retrial, the problems with passage of time will have only intensified.

Finally, this bill will limit the consideration of authorizations for successive petitions to a three judge panel of the court. Although the current statute prohibits a petition for rehearing following the denial of authorization for a successive petition, many courts of appeals have ordered rehearings sua sponte. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004); *Thompson v. Calderon*, 151 F.3d 918 (9th Cir. 1998); *In re Vial*, 115 F.3d 1192 (4th Cir. 1992); *In re Byrd*, 269 F.3d 585 (6th Cir. 2001); *Triestman v. United States*, 124 F.3d 361 (2nd Cir. 1997). There is no showing that rehearings are necessary for purposes of successive petitions. The considerations that counsel streamlining the appellate process in general carry even more weight at this procedural point of the litigation–in which an applicant has already made a complete trip through state and federal court. This bill will prevent rehearing after a panel acts on the request for authorization. An applicant still has recourse to an original habeas petition to the United States Supreme Court.

Section 9-Capital Cases

Chapter 154 of the AEDPA established the so-called "fast track" for capital cases that established qualifying systems for the appointment and compensation of competent counsel on state post-conviction review. To my knowledge, no state has ever qualified or been able to utilize Chapter 154's features.

This bill shifts the responsibility for determining qualifications from the courts that will be subject to the "fast track" system to the United States Attorney General. It is not unusual to vest such certification powers in the United States Department of Justice. Indeed, similar responsibilities were given to the Attorney General last year by the "Justice for All Act of 2004". The Attorney General's decision will be reviewed by an appellate court not affected by these provisions.

Two other revisions are notable. First, the bill limits the scope of issues cognizable in federal court under a Chapter 154 system. The only issues are similar to those heard on successive petitions or evidentiary hearings when the applicant has failed to develop a factual record in state court. The premise is that such review should be sufficient in a state providing the level of representation required by Chapter 154. [6]

The second revision is the extension of the time frame for consideration of claims in the district court from 180 days to 15 months. There had been concerns that the 180 day time frame was simply too narrow and this expansion will reduce those concerns. Given the narrowing of available issues, district courts may be able to complete review well within the 15 month time frame. On the other hand, since the issues will frequently focus on fact intensive claims relating to guilt or innocence, a 15 month time frame should allow sufficient time for investigation, discovery, any evidentiary hearings, and briefing.

Section 10-Clemency and Pardon Decisions

Since the United States Supreme Court's decision in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) which held that there were unspecified minimal due process protections for clemency proceedings, there have been last minute civil rights challenges to executive clemency in capital cases. In California, both of these challenges were ultimately unavailing. *Anderson v. Davis*, 279 F.3d 674 (9th Cir. 2002); *Siripongs v. Davis*, 282 F.3d 755 (9th Cir. 2002).

This bill removes federal court jurisdiction, except for the United States Supreme Court, to consider challenges to executive clemency. State courts will have the first opportunity to

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[6] I would be dubious about Constitutional objections about this provision. It does not foreclose habeas review of certain claims. Moreover, the Court has always indicated its deference to Congress on the scope of review. *See, e.g. Brecht,* 507 U.S. at 631; *Custis v. United States*, 511 U.S. 485, 493 (1994) (court expanded availability of federal habeas relief " by frankly stating that the federal habeas statute made such relief available ....").

hear these claims with review available from the nation's high court. Given the "minimal due process" safeguards involved in the clemency process, this level of review should be sufficient, especially given the last minute nature of this type of litigation.

Section 11-Ex Parte Funding Requests

Appointed counsel in federal habeas capital cases seek funding from the district court judges hearing their cases on an ex parte basis. Although such ex parte contacts should not occur without a showing of confidentiality, the practice has been for these contacts to continue to occur.[7]

Consistent with state practices, this bill requires these contacts to occur with a judge other than the judge assigned to decide the case.[8] This bill formalizes a process of notifying respondent of these contacts and giving the State an opportunity to be heard regarding these requests except as constrained by the attorney-client privilege.

Since habeas corpus proceedings occur only after proceedings are completed in state court, the actual need for secrecy should be minimal. *McKinney v. Paskett*, 753 F.Supp.861, 863 (D.Id. 1990)(" While a defendant's right to keep his defense to himself is clear in criminal matters, it is not so clear in habeas. Petitioner has already had a trial and a post-conviction hearing. What, exactly, does petitioner have here to be kept secret from the respondent, and to what end? By definition in a habeas case, all the issues before us have already been raised in state court.") Furthermore, the respondent is in a position to offer information and perspective about the case which will assist the judge in determining the amount of time and public monies for the applicant's investigations.

Section 12-Crime Victims' Rights

It is time to formalize a procedure for recognizing victims in the federal habeas process. In my experience, after the intense focus of the trial, many years follow in which victims and/or their families endure the abstract disconnectedness of appeals and post-conviction proceedings.

[7]Part of the problem is that the provisions for appointment of counsel in capital cases in federal court are not found in the habeas corpus statutes in Title 28, but in Title 21- the Food and Drug Code (!)- as part of the death penalty statute for drug kingpins. The reference to habeas corpus actions under section 2254 was uncomfortably slipped in amongst provisions for appointment of counsel in federal criminal trials and post-conviction proceedings.

[8]To avoid any ambiguity, the language should be expanded to apply to Magistrate Judges who are assigned to the cases as well.

Statement of Kent E. Cattani

Hearing on S. 1088 before the Committee on the Judiciary

United States Senate

July 13, 2005

I am Chief Counsel of the Capital Litigation Section in the Arizona Attorney General's Office. I am not here to argue that the death penalty is essential to justice in America. My interest is in explaining why I believe that unwarranted delay in federal habeas cases involving the death penalty interferes with important state rights and undermines public confidence in the criminal justice system.

I do not consider myself to be a death penalty proponent. However, I obviously do not oppose its application, and I am comfortable that there are crimes for which the death penalty is warranted. I am also comfortable that the decision whether to have a death penalty may be rationally made at the state or national level.

Having chosen to have the death penalty, the people of Arizona expect that the punishment will be administered fairly and that it will in fact be carried out when it has been imposed. The reality has been a system bogged down by extraordinary delay, primarily in the federal courts. Some death penalty cases have languished in the federal district court and in the Ninth Circuit for more than 20 years. I would like to address that delay, and to discuss in particular Arizona's frustrating efforts to opt-in to the accelerated review provisions of the Antiterrorism and Effective Death Penalty Act of 1996.

One of the key components of the AEDPA is a provision--specific to capital cases--designed to accelerate the federal habeas process on the condition that states opt-in by enacting procedures to ensure effective representation of indigent defendants in state post-conviction relief (PCR) proceedings. Under the opt-in provisions, the federal habeas process would be reduced to approximately three years by virtue of accelerated briefing schedules and a requirement that the federal courts rule on the claims raised within specified periods of time. The rationale underlying the opt-in provisions is that when more experienced attorneys represent death row inmates throughout the state court process, there is less of a need for a lengthy federal review.

After the AEDPA was enacted, the Arizona Legislature and the Arizona Supreme Court amended Arizona's system for appointing and compensating PCR counsel to meet the opt-in requirements. Arizona previously provided PCR counsel to all indigent capital defendants, and under the amended system, that provision remains and requires the appointment of an attorney who did not represent the defendant at trial or sentencing. Arizona enacted mandatory competency standards for attorneys who apply to be placed on a list of available counsel for capital PCR proceedings. There is an objective measure relating to bar status, continuing legal education, and years of experience as a lawyer and in practicing in the area of criminal appeals or post-conviction proceedings. There is also a subjective requirement that the attorney have "demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases."

In addition to provisions to ensure qualified counsel for PCR proceedings, Arizona already had in place a system to try to ensure qualified counsel at the trial stage. Since 1993, Arizona has required the appointment of two highly qualified attorneys in every case in which the State notices its intent to seek the death penalty. The requirements for

lead trial counsel include practice in the area of state criminal litigation for 5 years immediately preceding the appointment, having been lead counsel in at least 9 felony jury trials that were tried to completion; and having been lead counsel or co-counsel in at least one capital murder jury trial. There are additional legal education requirements and the same subjective requirement mandated for PCR counsel—that counsel shall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital case. Additionally, Arizona provides extensive funding for mitigation specialists and expert witnesses at both the trial and post-conviction stages. Multiple expert witnesses and intensive mitigation investigation are routinely utilized in capital cases throughout the state.

Notwithstanding these procedures to ensure that highly qualified criminal defense specialists represent a defendant during trial and post-conviction proceedings, Arizona has not been able to take advantage of the opt-in provisions of the AEDPA. After the new provisions for appointment of PCR counsel were in place, the Arizona defense bar temporarily boycotted the system; some attorneys did so based on their unwillingness to be involved in a process that might accelerate the death penalty process; others did so based on their concern that the newly enacted compensation provisions were inadequate. Subsequent clarification by the legislature made clear that there is no cap on attorneys' fees and provides for compensation at an hourly rate of up to $100 for 200 hours regardless whether a PCR petition is filed. The statute provides for compensation for additional hours upon a showing of good cause, and also provides for reasonable expert fees, investigative fees and litigation costs.

Since 2002, Arizona has spent more than 1 million dollars for PCR representation in 21 cases. Many of those cases are in the early stages of the post-conviction process, and will result in significantly higher expenditures by the state and local government. (The state pays for half of the cost of representation of indigent defense in capital cases; the county where the case was tried pays the other half.) Of the cases that have completed the post-conviction process, the expenditures have ranged between $25,000 and $138,000 for each case, with the median figure of approximately $64,000.

Prior to the clarification regarding compensation, there were only 6 attorneys on the list of qualified PCR counsel and a backlog formed of about 15 capital defendants who were ready to pursue PCR proceedings and were awaiting appointment of qualified counsel. In those cases, it took between one to two years to appoint counsel. More attorneys eventually applied for the list, and there are currently 4 Arizona cases pending at the PCR stage where the attorney was appointed without delay.

The first case that went through the state post-conviction process with an attorney appointed under the opt-in provision requirements was that of Anthony Spears, who was sentenced to death in 1992. In *Spears v. Stewart*, the district court denied Arizona's request that the case be treated as an opt-in case, and certified the opt-in issue to the Ninth Circuit for an interlocutory appeal. The Ninth Circuit held that Arizona's mechanism for appointment of counsel for indigent capital defendants in post-conviction proceedings meets the requirements of the AEDPA and qualifies for opt-in status. 283

F.3d 992 (9th Cir. 2002). However, the court held that the opt-in procedures could not be invoked in *Spears* because there had been a 20-month delay before counsel had been appointed in the state post-conviction proceeding. *Id.*

We were pleased that the Ninth Circuit found that Arizona's appointment mechanism for PCR counsel satisfies the requirement to be an opt-in state, but we were disappointed that the ruling does not apply to *Spears* or to any other case in which there had been a delay in appointing post-conviction counsel. The delay in appointing counsel did not prejudice Spears. His post-conviction never argued or suggested in any way that the 20-month delay affected his ability to pursue the claims Spears raised in his post-conviction proceeding. In my view, Spears was given every advantage contemplated under the AEDPA opt-in provisions, but the State has been denied the corresponding benefits to which it is entitled.

The holding in Spears places undue emphasis on what is essentially an arbitrary date. There is no set time line for any criminal case. Sometimes there is a delay between the date of the crime and the date of the arrest. Sometimes there is delay prior to trial, or delay during the trial or state appellate process. If, for example, there had been a delay in preparing transcripts for the appeal, or if the Arizona Supreme Court had taken additional time to resolve Spears' direct appeal, the PCR proceeding might have commenced on or about the same date even without delay in appointing counsel. Again, there was no suggestion that the delay in appointment of counsel prejudiced Spears' case. In my view, Arizona should have been deemed to have opted in to the accelerated provisions for capital cases.

That fact that Arizona has attempted to opt-in to the accelerated provisions of the AEDPA for capital cases does not signify an intent to foreclose a defendant's efforts to establish innocence. We have no interest in executing or even incarcerating an innocent person. We believe, however, that our state court system provides the necessary means to address claims of innocence, and that the federal habeas process does not measurably increase the likelihood that innocent persons will be vindicated.

The Arizona Rules of Criminal Procedure place no limitation on a defendant's ability to raise claims relating to newly discovered evidence or retroactive application of new substantive rules, and we permit DNA testing and retesting (as technology improves) at state expense any time there is evidence that may establish innocence. We have a specific rule of criminal procedure that exempts from the rules of preclusion any evidence that would establish that the defendant did not commit the crime or should not have been subjected to the death penalty. Thus, it is hard to fathom a claim of innocence for which an Arizona defendant would not be granted relief in state court, but which would entitle the defendant to federal habeas relief.

I believe that the best way to improve our criminal justice system is to ensure that quality representation and adequate resources are made available for the main event – the trial and sentencing proceedings. We are trying to do that in Arizona, and we have a system that provides defendants in capital cases with two highly qualified attorneys at trial,

another highly qualified attorney to handle a direct appeal, and yet another highly qualified attorney to handle state post-conviction proceedings. The direct appeal process includes review by the Arizona Supreme Court (whose members are appointed through a merit selection process) and the United States Supreme Court, and the post-conviction process permits review not only by the original trial court, but again by the Arizona Supreme Court and the United States Supreme Court. That same type of review is also available for successive post-conviction relief proceedings, where a defendant seeks to raise claims of newly-discovered evidence, change in the law, or freestanding claims of innocence.

Providing this level of review at the state court level should decrease the number of meritorious claims that are presented in federal court (since federal habeas review permits only claims that have first been presented in state court). Nevertheless, during the past 10 years, we have seen an *increase* in the number of claims that are being raised in federal court and an increase in delay in federal court. That delay has prejudiced the state's and crime victims' interest in fairness and the finality of state court judgments, and has decreased public confidence in the criminal justice system.

Section 9 of Senate Bill 1088 proposes a revision of the opt-in requirements to shift the responsibility for determining whether a state has opted in from the courts to the United States Attorney General. Given the fact that a federal court ruling that a state has opted-in would subject the federal court to fast-track requirements that accelerate the pace of required work, there is a logical basis for this proposed change. Judicial oversight of the Attorney General's decision would still be available through the Court of Appeals for the District of Columbia Circuit

Section 9 further proposes a relaxation of the fast track deadlines for consideration of claims in the district court from 180 days to 15 months. Although 180 days should be sufficient to address claims that have necessarily been raised previously in state court, the additional 9 months creates a more realistic time frame to address federal habeas claims in federal court. From the perspective of states who have unsuccessfully attempted to "opt-in," a 15-month review period is obviously a great improvement over the current essentially unlimited review period.

Several other aspects of Senate Bill 1088 would help to expedite capital and non-capital cases in federal court, while still providing protections for defendants attempting to raise claims of actual innocence. For example, Section 4 addresses procedural default. Under current law, federal courts may not consider a claim if it was not properly raised under state procedural rules. There is an exception if an applicant shows "cause" for the failure to raise the claim and "prejudice" from the asserted error. Alternatively, if an applicant produces evidence of "actual innocence," the federal court may consider the claim. The applicant may also avoid the procedural default rule if the federal court finds that the state court did not regularly apply the procedural rule or if the procedural rule actually required some consideration of the Constitutional merits of the claim.

Senate Bill 1088 would refine the procedural default doctrine by precluding federal courts from considering claims that were rejected by state courts as "procedurally barred" even if the state court separately denies the claim on the merits. Nor will the federal courts be able to consider the claim if it is raised in the context of ineffective assistance of counsel. Finally, the federal courts will not be able to review a claim denied on procedural grounds in state court even if the state court has exceptions for its procedural default rule based on the serious nature of the alleged error.

An Arizona capital case, *Smith v. Stewart*, 241 F.3d 1191 (2001), provides an example of why this type of change is needed. In *Smith*, the state courts rejected a claim of ineffective assistance of sentencing counsel (raised in Smith's third post-conviction proceeding) on the basis of a state procedural bar. The federal district court rejected the claim on the basis of procedural default, but the Ninth Circuit reversed, holding that the state procedural default ruling was intertwined with a merits ruling. The Ninth Circuit reasoned that, because a Comment to Arizona's procedural rules noted that for some issues of significant constitutional magnitude, the state must show a knowing, voluntary, and intelligent waiver by the defendant, Arizona's procedural default rule necessarily required a merits ruling on every defaulted claim. Arizona argued that the comment suggested only the need for an on-the-record waiver of certain types of claims, including the right to counsel or the right to a jury trial. The Ninth Circuit rejected the State's argument, as well as its request that the court certify a question to the Arizona Supreme Court to clarify whether a procedural default ruling necessarily encompassed a merits ruling. Arizona filed a certiorari petition in the United States Supreme Court, which reversed the Ninth Circuit's ruling.

Although the State ultimately prevailed in the United States Supreme Court, the victory simply returned the parties to where they were two years earlier. In the meantime, every other case involving a procedural bar imposed by an Arizona court was similarly delayed pending resolution of *Smith* in the United States Supreme Court.

Smith's federal habeas proceeding has been pending since 1994. The district court denied relief in 1996, and the case has been in the Ninth Circuit since then. Most recently, the Ninth Circuit ordered a stay to allow Smith to pursue a claim of mental retardation in state court, even though Smith had never raised a claim of mental retardation in state court or in the federal district court. Arizona has filed a certiorari petition in the United States Supreme Court challenging that ruling. In the meantime, the case, involving a 1982 conviction of first-degree murder, kidnapping, and sexual assault, remains in limbo.

In *Cassett v. Stewart*, 2005 WL 1021273 (a non capital case), the Ninth Circuit recently added another impediment to resolution of procedurally defaulted claims. Cassett never raised the claim at issue in state court, and the district court found his federal habeas claim to be precluded. The Ninth Circuit reversed, however, ruling that because there has not been a ruling of preclusion by a state court, the case should not be dismissed and Cassett should be given an opportunity to return to state court to raise the claim. If the rule in *Cassett* is applied in capital cases, an already delayed process will be delayed even

further to allow defendants to return to state court to try to litigate procedurally defaulted claims. As with the *Smith* case, Arizona is seeking further review of *Cassett* by the United States Supreme Court.

In addition to *Smith*, there are several other examples of capital cases that demonstrate extensive delay in the federal habeas process:

Joseph Lambright

Lambright was Smith's co-defendant, and was similarly convicted and sentenced to death in state court in 1982. In 2004, the Ninth Circuit ordered an evidentiary hearing on a procedurally defaulted claim that Lambright's counsel had failed to investigate as possible mitigation the possibility that Lambright suffered from post-traumatic stress disorder based on his combat experiences in Viet Nam. .

At the evidentiary hearing held last year in federal district court, the State established that Lambright was never in combat in Viet Nam; he was a mechanic who was never involved in a combat situation. The friend who Lambright claimed to have held in his arms after the friend was sawed in half by enemy fire, is in fact alive and well in Florida. The case remains pending in the Ninth Circuit; the only issue now before it is the propriety of the district court's ruling that Lambright did not establish that his counsel was ineffective for failing to assert post-traumatic stress disorder as a mitigating circumstance.

Michael Corrrell

Correll was convicted in 1984 of first degree murder in a triple homicide case. The trial court sentenced Correll to death after finding four aggravating factors beyond a reasonable doubt: that Correll committed the offense in expectation of pecuniary gain, that the murders were committed in an especially cruel, heinous or depraved manner and multiple homicides. Correll's federal habeas proceeding has been pending since 1987. The district court denied habeas relief in 1995. However, the Ninth Circuit ordered an evidentiary hearing regarding whether counsel was ineffective at sentencing.

At the evidentiary hearing held in 2003, Correll called fourteen witnesses during the hearing including the original trial attorney; a mitigation specialist; a neuropsychologist; a psychiatrist; and addictionologist; a toxicologist; and several of Correll's family members and friends. The State responded that if Correll had provided this alleged mitigation evidence to the trial court, it would have opened the door for the State to present powerful rebuttal evidence, including evidence of Correll's rape of a female psychiatric patient while he was undergoing treatment for his antisocial personality disorder; Correll's repeated sexual assaults against his sister while living at home; Correll's numerous escape attempts from mental health facilities; and Correll's participation in a number of armed robberies with this thirteen year old brother and fifteen year old girlfriend.

In March 2003, the district court denied Correll his requested relief, finding that Correll did not suffer any prejudice as a result of his counsel's deficient performance. The district court held that, "after all of the evidence that [trial counsel] could have obtained and presented has been reviewed, it is clear that the rebuttal and non-mitigating aspects of such evidence overwhelms any slight mitigation evidence."

Correll immediately appealed that ruling to the Ninth Circuit, and the case has remained pending in that court since then. Thus, the case has been pending in federal court for 18 years.

Jasper McMurtrey

The federal district court ordered an evidentiary hearing regarding whether the state trial court should have conducted a competency evaluation of capital defendant McMurtrey. The state court held an evidentiary hearing in 1994, after which the trial judge, who had presided over McMurtrey's trial, found that McMurtrey had been competent during trial. The district court nevertheless granted federal habeas relief, finding that there was not enough evidence from which the trial judge could reach the conclusion that McMurtrey was competent during trial, even though the evidence included the trial judge's own recollection of what happened. Arizona is seeking further review of that ruling.

The common thread in these cases is not only one of excessive delay in federal court, but of an absence of any allegation of factual innocence. The federal habeas process is not accomplishing its intended purpose in these and many other cases and is in fact undermining public respect for the criminal justice system.

Executed man's case reopened

Ten years after execution, 25 years since killing

ST. LOUIS, Missouri (AP) -- Citing grave concerns that Missouri executed an innocent man, a coalition that includes a congressman, high-profile lawyers and even the victim's family pointed to evidence Tuesday that they said could clear Larry Griffin's name.

Prosecutors have decided to reopen the case of Griffin, who was convicted in 1981 in the murder of Quintin Moss, a 19-year-old drug dealer who was shot to death. Griffin maintained his innocence to the end, but was put to death in 1995.

Now, many people, including some members of Moss' family, believe him.

"What I have heard recently is very troubling and leads me to believe an innocent man was executed for this murder, while the real killers have not been brought to justice," said Rep. William Lacy Clay, D-Missouri, who spoke at a news conference Tuesday with other supporters of Griffin.

The news conference followed a report compiled by a University of Michigan Law School professor who discovered new information on the case in the last year. The report suggests that:

- The first police officer at the scene of the 1980 shooting, Michael Ruggeri, now says that the story told by the supposed eyewitness was false, even though Ruggeri's own testimony at trial supported what the witness said.
- A second victim of the shooting, Wallace Conners, has said he was never contacted by the defense or the prosecution. Conners, now 52, who was wounded in the attack, said the supposed eyewitness was not present at the shooting.

"I tell all you all, Larry Griffin did not commit this crime," Conners told reporters. "Larry Griffin definitely wasn't in the car."

Original prosecutor: Testimony about revenge

The report, by Michigan professor Sam Gross, called into question the credibility of the only person who testified at the trial that he saw the murder. Robert Fitzgerald later testified at an organized crime murder trial and in other prosecutions, and "judging from news coverage, he developed a reputation as a snitch who couldn't produce convictions," Gross' report said. Fitzgerald died last year.

There was no DNA evidence in the case, prosecutor Jennifer Joyce said.

But Gordon Ankney, the original prosecutor who is now in private practice, believes Griffin was the killer.

"I believe the jury did the right thing, and nothing's happened that's led me to believe otherwise," Ankney said.

Ankney said the new information discounts several facts from the case. He said an off-duty officer saw Griffin get in the car used in the drive-by shooting the day of the murder. He said the murder weapon was found in the car and that Conners told police twice he wouldn't be able to identify who shot him.

He also pointed out there was testimony that Griffin killed Moss in revenge for the slaying of one of Griffin's brothers, Dennis. Moss had been questioned by police in that shooting, but not charged.

Moss' older brother, Walter Moss, is among those supporting a reinvestigation of the case.

"I myself am not here to accuse, blame or show anger. It's been 25 years since my brother was murdered and 10 years since Larry Griffin was put to death for that murder," Walter Moss said.

John Fougere, a spokesman for the state Department of Corrections, said he was unaware of any previous situation where a Missouri case was reopened after an execution.

Find this article at:
http://www.cnn.com/2005/LAW/07/12/execution.investigation.ap/index.html

☐ Check the box to include the list of links referenced in the article.

Jul 13 2005 16:51:41 Via Fax -> US SENATE The Honorable Patric Page 001 Of 001

Department of Social Development and World Peace
3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • FAX 202-541-3339
WEBSITE: WWW.USCCB.ORG/SDWP

July 13, 2005

Dear Senator:

As Chairman of the Domestic Policy Committee of the United States Conference of Catholic Bishops, I am writing to convey our grave concerns regarding S. 1088, *The Streamlined Procedures Act of 2005*, when it is considered by the Judiciary Committee. The Committee is concerned because the proposed bill would dramatically diminish the federal courts' ability to consider habeas corpus petitions in death penalty cases, even in cases of actual innocence.

As you know, the bishops of the United States oppose the use of the death penalty in our country. Catholic teaching on capital punishment is clear: If non-lethal means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity with the dignity of the human person (*Catechism of the Catholic Church*).

Nothing illustrates the need for non-lethal punishment more than the disturbingly large number of death row inmates across our country who have been exonerated (119 since 1973), some within days or hours of being put to death. At a time when there should be more safeguards put in place to protect the innocent from wrongful conviction and to prevent lethal mistakes in death penalty cases, S. 1088 attempts to take away some of the safeguards already in place.

S. 1088 would severely limit the circumstances under which a death row inmate can obtain federal habeas corpus review of his or her conviction or sentence. For example, Section 9 of the bill would strip federal courts of jurisdiction to consider most claims challenging either a conviction or sentence of death in states that provide competent counsel to indigent prisoners in state post-conviction proceedings. The only exceptions would be for prisoners who advance claims based on new rules of constitutional law that the Supreme Court has made retroactive, and those who offer newly discovered evidence on the basis of which no reasonable fact finder could have convicted. Section 6 of the bill would deprive federal courts of jurisdiction to review most sentencing claims if a state court previously concluded the error was "harmless" or "not prejudicial."

Our Church fully believes that those who commit terrible violent crimes must be incarcerated, both as just punishment and in order to protect society. We stand in solidarity with victims and their loved ones. However, when it comes to matters of life and death, morality and common sense call for careful safeguards. Therefore, we urge you to oppose efforts to eliminate these safeguards. Thank you for your careful consideration of this important matter. Asking the Lord to bless you and always be with you, I am

Faithfully yours,

+ Nicholas DiMarzio

Most Reverend Nicholas DiMarzio
Diocese of Brooklyn
Chairman, Domestic Policy Committee
United States Conference of Catholic Bishops

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202-541-3180	202-541-3185	202-541-3199	202-541-3160	202-541-3195

07/13/2005 05:05PM

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

Hon. Arlen Specter, Chairman

Legislative Hearing on S. 1088
"The Streamlined Procedures Act"

July 13, 2005

Testimony of Thomas Dolgenos
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I am an assistant district attorney in Philadelphia. It is my job, and the job of the other lawyers in my unit, to respond to hundreds of habeas corpus petitions each year. We are on the front lines, and I believe there are some real problems in the habeas system that have recently grown worse, despite the enactment of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") in 1996. I also believe, however, that the proposed Streamlined Procedures Act contains carefully crafted, common sense responses to some of the worst abuses we commonly face.

I also want to emphasize that these problems are not limited to death penalty cases. On the contrary, they apply across the board, to all of the convictions that reach the federal habeas stage – murder, rape, robberies, and other violent crimes. Only a small percentage of these cases involve the death penalty. The SPA would help protect the rights of victims, and encourage the fair and effective use of the criminal justice system, in all of these cases.

I. PROBLEMS IN CURRENT HABEAS LITIGATION

What follows is a short description of the kinds of abuses that now infect the habeas system; afterwards, I will briefly describe how these problems are addressed by various sections of the SPA.

DELAY

This is a familiar problem, but it is something we see every day. Criminals who were convicted five, ten, or twenty years ago continue to complain about their trials and raise new claims. The facts are endlessly re-litigated. The process goes on and on.

There are many costs associated with delay: The victims pay a heavy emotional cost, of course, because they and their families must relive the crimes again and again, without any closure or sense of justice. But they have no choice but to remain involved – otherwise, the criminal is left alone to make his arguments, and pose as the victim of an unfair system, without any effective rebuttal. The states also bear the cost of delay, because we have to pay for prosecutions that never really end. To take a small example – in the past five years, the number of attorneys in my office who are assigned as full-time habeas attorneys has increased by 400%. The public, too, bears the cost of delay, both because it is expensive to support drawn-out litigation, and because time dilutes the effectiveness of the criminal justice system. Deterrence works best when punishment is swift and sure; when the process is open-ended, and nothing ever seems final, the system breaks down.

I want to emphasize one other important point: The truth is a casualty of delay. As years pass, memories fade. Evidence is lost. Witnesses who were once sure cannot remember everything. Other witnesses disappear. Some witnesses, who never wanted to get involved in the first place, are extremely reluctant to testify again years later. In fact, the longer the process goes on, the more opportunities exist for witness tampering and intimidation. After all, police and judges cannot protect witnesses forever, and too often a "recantation" (or other new evidence) is simply the product of coercion. The point is, repetitive hearings and re-litigation of guilt do not increase reliability, and they can discourage witnesses from coming forward in the first place.

Causes of delay – unenforced deadlines and "equitable tolling"

In 1996, Congress and President Clinton tried to end unnecessary delays by creating a one-year deadline for habeas cases. Delays still happen, though, because the deadline is not strictly enforced. Sometimes the courts invoke "equitable tolling" and refuse to enforce the deadline simply because its application might be "unfair" to the criminal, which is an unpredictable standard.

The deadlines are often suspended on "equitable" grounds, often in absurd situations. One defendant named Robert Graham, who pled guilty to rape and a series of armed robberies in 1977, filed a habeas petition twenty-four years later. His "excuse" for his late filing was that he had no lawyer, couldn't understand legal documents, and wasn't able to sufficiently "trust" anyone to help him with the preparation of a federal habeas petition. We pointed out that he had filed other legal petitions in state and federal court over the years, as well as many written prison grievances, and "trust" had never been a problem before. But the court held a hearing, and appointed counsel and a psychological expert for Graham. We were forced to hire our own expert, at a cost of many thousands of dollars. Our expert testified that Graham had been fully capable of filing on time. But the district court held that Garrick's "difficulty in trusting and seeking the assistance of others" deserved "equitable tolling" and could go forward with his case. Graham v. Kyler, 2002 U.S. Dist. LEXIS 26639, *30 (E.D. Pa. 2002).

Or there is Mark Garrick, who robbed and murdered a man in 1975. Garrick said he couldn't file on time (more than twenty years later) because he didn't have enough money for the federal filing fee and he didn't have the right forms to file without it. We found out, however, that the prison *did* have the right forms, and anyway a few days

before the filing Garrick had plenty of money in his account – but he spent most of it at the prison commissary on junk food. We eventually won that case in the district court, but only after many briefs and a hearing; even after all that, the Third Circuit somehow concluded this was a close case, and allowed Garrick (with his appointed counsel) to appeal. As a result, this case is still ongoing.

Needless to say, it is frustrating to see these cases, and others like them, continue to drag on. The "equitable tolling" standard is slippery and needs fixing.

Slow litigation in the federal courts

Part of the problem is that federal courts often take too long to decide cases. We have seen some habeas matters sit in the district and circuit courts for years with no action. And there is almost nothing we can do about it.

My colleague, Ronald Eisenberg, testified before the House subcommittee considering H.R. 3035 and 3060 about several cases which have languished for years in federal court without any decision at all. I am attaching his testimony before the House subcommittee to this statement, and I incorporate it here. As Mr. Eisenberg testified, "Federal habeas courts have great power, simply because they are last in line. But they have little responsibility, because they are so far removed in time and space from the circumstances of the crime and the subtleties of the state proceedings. Accordingly, they have small motive to act expeditiously or efficiently, to give credit to the judgment of their brethren in state courts, or to consider the needs of crime victims. The only way that balance can be restored is by congressional statute."

Evading the statute of limitations by "staying" mixed habeas petitions

One common way in which prisoners and district courts defeat the one-year habeas deadline is through "stay and abey" orders. What happens is this: Prisoners file habeas petitions that contain some claims that have already been rejected by the state courts, and one or more new claims. The district court then "stays" the petition, and places it in suspense, while the petitioner tries to exhaust the new claim(s) in state court, in effect starting the process over again.

It hardly needs mention that this practice makes the one-year deadline meaningless. It converts habeas into a jurisdictional foot-in-the-door, where prisoners can park their claims without worrying about deadlines. Plus, the stay-and-abey practice effectively rewards prisoners who have failed to timely raise their claims in state courts in the first place.

The Supreme Court has recently partially restricted this kind of stay, in Rhines v. Weber, 125 S. Ct. 1528 (2005), but under Rhines a petitioner will still be able to get such a stay upon a showing of "good cause." This vague standard promises to create a wealth of new litigation. In the meantime, we continue to see many such stay orders issued by federal district courts, ensuring years of new delays.

RELITIGATION OF OLD CLAIMS

State criminal convictions are entitled to respect. When the jury (or the judge) weighs the evidence and makes a decision, that is a significant event. Each state has its own rules and procedure for ensuring that their trials are fair, and if there are complaints, each state provides its own review procedure. State judges are just as duty-bound as their

federal counterparts to uphold the Constitution. If a prisoner has a federal claim to make, he must make it first in state court. If he does not properly present it to the state courts, the federal courts should not reach it, either. If the state court rejects the claim on the merits, *only then* can he go to federal court – and the federal court must defer to the state court's decision if it was reasonable.

That is the law. It is relatively simple, and it makes sense. If federal courts were free to re-weigh the evidence or litigate new claims, the process would truly be endless, unworkable and unconstitutional. State trials would merely be a prelude to the "main event" in federal court. States would be stripped of the power to enforce their own criminal laws.

Too often, however, federal courts do re-weigh the evidence, or entertain claims that have not been decided by the state courts. There are a number of ways that federal courts can do this; each method allows the court to evade both the exhaustion requirement, and the AEDPA deference standard.

Ignoring "inconsistently applied" state rules

When a state court rejects a claim because it is improper under the state's own rules – for example, it may be waived or raised too late – a later federal habeas court is obligated to defer to the state court's application of its own rules, and must also decline to entertain the claim. Otherwise, a prisoner could violate any state procedural rule, knowing that later the federal court will hear all of his claims anyway. But under the "inadequacy" doctrine, a federal court may decide that the state rule is "inconsistent" and

hear the claim anyway, even though the state courts have held that its rules have been violated.

In practice, this means that federal courts can ignore all of what happened in state court, and entertain defaulted claims as if they were fresh and properly preserved, simply by finding that a particular state rule is, in the opinion of the federal court, inconsistent. This is a powerful way around AEDPA's various restrictions. For example, the Third Circuit recently held that Pennsylvania's own time-limit on state collateral review was inconsistently applied in death penalty cases for the first few years after its enactment in 1996 – despite the fact that the deadline has always been strictly and uniformly applied exactly as it was written. See Bronshtein v. Horn, 404 F.3d 700, 707-710 (3d Cir. 2005). For the Third Circuit, the mere possibility that death penalty defendants could imagine an exception to the deadline in capital cases – an exception that is nowhere in the statute, and which was never applied to the time-bar by Pennsylvania courts – rendered the state deadline somehow unpredictable and inadequate, until the state supreme court explicitly rejected it. As a result, there is now apparently no such thing as default in Pennsylvania capital cases pending in the late 1990's, which is virtually all of the cases now pending in habeas. Criminals in these cases are presumably able to raise entirely new claims and introduce new evidence, without any showing of innocence. The burden on the State to relitigate these cases is huge; the emotional burden on the victims' families is incalculable.

The loose application of "inadequacy" creates a perverse incentive for states to adopt rules with absolutely no exceptions and no room for judicial discretion. This is not a desirable result, for prisoners or anyone else.

The "ends of justice" exception

Another way around procedural default is through use of the "independence" requirement – that is, a state procedural rule must be "independent" of federal law, or the federal courts can overlook it. The rationale is, if the state rule is intertwined with, or dependent on, federal law, then the application of the rule amounts to a decision on the merits of the federal claim. But sometimes, the "independence" requirement is applied in peculiar ways. For example, many states have an "ends of justice" exception to their rules and deadlines. Some federal courts have held that if the "ends of justice" exception involves a cursory review of the merits of the claim – however fleeting – then the application of the rule is "dependent" on federal law and there is no default. See, e.g., Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990) (no default under Washington State rule because it includes "ends of justice" exception).

In addition to providing yet another mechanism for evading AEDPA's deference requirements, as well as the rule of exhaustion, this creates another perverse incentive for states to create absolute rules with zero exceptions, whether it serves justice or not.

The "actual innocence" standard

A showing of "actual innocence" allows petitioners to go forward with their habeas case, despite the existence of various bars. This obviously serves the interest of justice – no one wants to see the innocent wrongly punished. But the bar must be set high for these claims, and it is easy to see why. Claims of innocence are routinely made. They are the rule, not the exception. For the most part, however, claims of "innocence"

are simply dressed-up attempts to argue the evidence all over again. If the mere allegation of innocence is enough to re-open otherwise barred claims, then nothing would ever be final. An incrementally higher standard – say, requiring the petitioner to make a "colorable" claim of innocence – would ultimately be no better. Many (if not most) defendants who go to trial have a "colorable" claim of innocence. But in the end, the jury may conclude that guilt has nevertheless been proven beyond a reasonable doubt – after all, "beyond a reasonable doubt" does not mean "beyond *all* possible doubt."

The only workable solution is to set the bar very high for claims of "actual innocence." The presumption of guilt, which attaches when a defendant is convicted, should not be pierced unless there is new evidence that the jury did not hear. Nor is this enough by itself, because it is always possible to find (or create) unpersuasive new evidence. The new evidence must be convincing enough to mean that no reasonable juror would have voted to convict. This is the standard of Schlup v. Delo, 513 U.S. 298, 329 (1995), and it is the standard used at various points in the Streamlined Procedures Act. It is the only bar-overcoming "innocence" standard that makes sense. In her concurring opinion in Herrera v. Collins, 506 U.S. 390, 419-20, 426-27 (1993), Justice O'Connor, with Justice Kennedy concurring, stressed this point: If the "actual innocence" standard is too easy to meet, "the federal courts will be deluged with frivolous claims of actual innocence" by prisoners "who, refusing to accept the jury's verdict, demand[] a hearing in which to have [their] culpability determined once again." To avoid such a result, "[I]f the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved for the truly extraordinary case."

A couple of examples from my recent experience will, I hope, make the point more clear. First, there is a man named Raymond Smolsky who repeatedly molested and raped a five-year-old girl in Philadelphia about seventeen years ago. He filed a habeas petition in 2000, raising some claims that he had not properly presented to the state courts; but, he claimed, he was "innocent" and the victim had recanted, so he contended that everything was subject to more review. But the recantation was ambiguously worded; when we investigated, the victim – now a young woman – told us that the defense investigator had misled her. This investigator had not clearly identified herself as a member of the defense team; she had urged the victim to sign the statement while assuring her that Smolsky would remain in prison; and the statement (written by the defense) had been worded just ambiguously enough to make it sound as if Smolsky had not committed rape, when in fact he had. The victim was mortified when we told her that she had signed a defense-prepared affidavit that was designed to get Smolsky out of prison.

Smolsky's strategy had been to manufacture evidence to qualify under the "actual evidence" standard; otherwise, his claims were barred. We were able to convince the court that this new "evidence" should be examined first by the state court, and the habeas petition is now stayed pending a state court hearing. In the meantime, the victim has been dragged back into the case. An easy-to-meet, defendant-friendly standard will encourage more of this kind of abuse.

Aaron Jones is another criminal who has tried to take advantage of the "actual innocence" standard to relitigate his case. Jones was the head of a notorious and violent Philadelphia drug gang, which was finally brought to justice after extensive federal and

state investigations. Part of the problem was that this gang had a pattern of murdering witnesses (including other gang members) who would dare cooperate with authorities. Jones was finally, after much effort, convicted of murder and sentenced to death. After years of state court appeals and review, Jones filed a federal habeas petition with many completely new claims, and a request for wide-ranging discovery into state and federal files, including information about witnesses who are still in the witness protection program. We pointed out that many of his claims were unreviewable because they had not been properly presented to the state courts, and the discovery was thus unjustified. But Jones argued that he had made a claim of "actual innocence" which put everything back on the table. His evidence of innocence, however, was simply a re-hash of his earlier argument that the prosecution's witnesses were lying to curry favor with the government. He simply hoped to obtain more discovery because he might discover something helpful that he hadn't found before.

As of this date, both state and federal authorities have provided yet more discovery in the Jones case, and the district court is currently considering whether Jones' allegation of innocence entitles him to anything more, or to litigate anything he wants.

While it is important to protect the innocent, an "actual innocence" exception to various bars and deadlines is a potentially major loophole. It provides a continuing incentive to re-argue old facts, manufacture new evidence, and intimidate victims and witnesses. The "innocence" exception must be strict, and it must be guarded carefully.

Evading rules through allegations of "ineffective" counsel.

Perhaps the most common way of reviving waived claims, in both state and federal court, is through an allegation that defense counsel provided such incompetent representation as to violate the constitutional guarantee of effective counsel. Usually, the petitioner complains that his lawyer should have made an objection of some kind, but did not. Such claims turn on three inquiries: (1) How meritorious was the claim that wasn't raised? (2) Did the defense counsel have an understandable reason for not making the argument? And (3) Did the "omission" change the outcome of the trial? In federal habeas cases, these claims too often focus on the first prong (the merits of the waived claim) without any consideration of the second or third (counsel's possible reasoning, and the prejudice to the defendant). In practice, that means that the waived claim gets reviewed as if it were properly preserved. Even more disturbingly, these allegations often involve issues of state law that the defense lawyer didn't raise – for example, an evidentiary objection, or a state rule of procedure – and the federal court simply converts itself into an arbiter of state law as it decides whether the foregone objection was meritorious.

Sometimes, the issue is even further confused by misapplication of the exhaustion rules. Some federal judges have held that where a prisoner has raised a claim of ineffectiveness in state court, this not only serves to exhaust the ineffectiveness claim, but the underlying issue as well, which can be freely reviewed on the merits by the federal court, as if the defense lawyer had actually made the objection. For example, see Veal v. Myers, 326 F.Supp.2d 612, 617 (E.D. Pa. 2004).

The only way to justify federal court adjudication of ineffectiveness claims, is to focus on counsel's conduct rather than the underlying allegation of error, and to recognize that exhaustion of an ineffectiveness claim is very different from proper preservation and exhaustion of the underlying claim. Otherwise, the federal court will routinely decide waived claims, and resolve state law issues, without a proper focus on the lawyer's conduct.

II. SECTION-BY-SECTION ANALYSIS OF HOW THE STREAMLINED PROCEDURES ACT WILL ADDRESS THESE PROBLEMS

SECTION 2: MIXED PETITIONS

This section sets out a new procedure for dealing with habeas petitions that contain both exhausted and unexhausted claims. The exhausted claims will be considered; the unexhausted claims will be dismissed with prejudice, meaning that they cannot be raised again in federal court absent extraordinary circumstances.

Under this provision, prisoners will no longer be able to obtain a stay to exhaust their claims that were never presented to the state courts, as I described in the previous section. They must, rather, abide by the statute of limitations. Further, this provision creates clear, negative consequences for prisoners who do not exhaust their claims before coming to federal court – thus ensuring that they will attempt to raise every claim in state court at the first opportunity, which is, after all, the goal of the exhaustion requirement.

This section also clarifies requirements for pleading exhaustion of state remedies. Under the new 2254(b)(1)(A)(i), the prisoner must clearly present the federal claim to state courts, and he must identify the stage of the state proceedings where he did so, in

order to proceed on the claim in federal habeas. This will ensure that states actually have the chance to decide each and every federal claim the petitioner later presents to federal court – instead of having to guess what the prisoner might mean by vague references to "due process" or the like.

Finally, this provision sets out a standard of review for unexhausted claims that, nevertheless, ultimately qualify for federal review. These claims must be denied unless "the denial of relief is contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." See Section 2254(b)(1)(B)(ii). This is the familiar AEDPA standard that elsewhere governs review of claims that have been decided by the state courts. (In several other sections of the SPA, the same familiar standard is applied to other claims that qualify for federal review but were not decided by the state courts, either because they were never submitted, or were not submitted in accordance with state rules.) Applying this standard across the board ensures that petitioners who do not properly submit their claims to the state courts are not in a better position, with a more claimant-friendly standard of review, than prisoners who *do* properly submit their claims to the state courts. This standard also codifies a presumption of constitutionality: If reasonable minds can disagree over whether there was any error, then in deference to the states, the conviction will remain undisturbed.

SECTION 3: AMENDMENTS TO PETITIONS

This section of the Act provides a straightforward remedy to a common problem: Sometimes, petitioners who file timely habeas petitions later try to add more claims, after

the one-year deadline has passed. Under this subsection, a petition may be amended once as a matter of course before the State files its response, and the one-year deadline passes. After that, no more amendments will be allowed, unless the prisoner meets the "actual innocence" standard. This is one more way to combat delay, and to require that the petitioner make all of his claims up front, in a timely manner.

SECTION 4: PROCEDURALLY DEFAULTED CLAIMS

This section addresses the various ways described above by which the federal courts can ignore state procedural defaults. It sets out one clear standard: If a claim has been procedurally defaulted in state court, it will be barred from consideration in federal habeas unless it implicates meaningful evidence of actual innocence.

The enactment of this section would address the various evasions of default in several ways. First, the "inconsistent application" method of avoiding state procedural defaults would no longer be available. Federal courts would no longer be in a position to "grade" state procedural rules governing state convictions – the only way to overcome a default would be through a convincing showing of innocence. Second, states would be free to incorporate exceptions to their rules for miscarriages of justice, without running the risk that the federal court would find that the rule is no longer predictable or "independent" of federal law. Third, this section bars ineffectiveness-of-counsel claims that are derivative of defaulted claims, in order to prevent prisoners from avoiding the consequences of a state default by recasting the claim in ineffectiveness terms.

The message is clear – all federal claims must be properly exhausted in the state courts, in accordance with state rules, or the federal court will not hear it without a

meaningful showing of innocence. Enactment of this provision will give back to the states the power to make and enforce their own procedural rules without undue federal interference.

SECTION 5: TOLLING OF LIMITATION PERIOD

These important provisions relate to the one-year habeas deadline enacted in 1996. Under the current § 2244(d)(2), that deadline is tolled while the prisoner pursues state collateral relief – specifically, the habeas clock stops while a "properly filed" state collateral petition is "pending." The proposed language clarifies several key points. First, the habeas deadline is tolled only where the petitioner seeks review of federal claims that may later form the basis of a habeas petition; litigation of unrelated state claims do not extend the federal deadline. Second, this provision clearly limits tolling to the period where the claims are actually pending before a state court. If the prisoner's state petition is rejected by one court, and he waits awhile before appealing or otherwise challenging the decision, the time in-between is not "pending" and has no tolling effect. This would eliminate the phantom, make-believe period of "pendingness," when nothing is actually pending, that Judge Easterbrook criticized in Fernandez v. Sternes, 227 F.3d 977, 980 (7th Cir. 2000).

The third change is, I think, the most important. The new § 2254(d)(4) would limit the grounds for allowing tolling of the one-year habeas deadline to those grounds actually identified in the statute. This would curtail the enormous explosion of "equitable tolling" litigation. If the prisoner has new evidence, or relies on a new rule of law, or has been prevented from filing by government officials, or is properly pursuing state

collateral review, the deadline is tolled. Otherwise, it is not tolled. This would prevent results like that in the Robert Graham case described above, where a costly battle of experts, and Graham's supposed inability to "trust" others to do his legal work, was enough for the prisoner to evade the deadline for years. It is also common sense, because presumably AEDPA means what it says, and if a ground for tolling does not appear in the statute then it should not be applied.

SECTION 6: HARMLESS ERROR IN SENTENCING

This provision is aimed at the particular problems arising from claims of state sentencing errors. This type of complaint can easily devolve into fact-intensive second-guessing about whether the alleged sentencing mistake made any difference. As the law currently stands, it is confusing – federal courts ask whether a state court's finding that the error could not reasonably have affected the sentencing was itself reasonable. In addition to creating a tangled, two-layered reasonableness review, this standard inevitably involves a subjective re-weighing of the facts.

The proposed new language replaces the fact-intensive inquiry with a legal inquiry: Rather than asking about the likely impact of the weight of the evidence on local juries, the new standard asks whether the error itself rises to the level of "structural" error. The Supreme Court has identified several kinds of "structural" errors that merit reversal without a harmlessness analysis. If the alleged sentencing error fits into this category, then relief may issue. If not, then a sentencing error that was determined by the state courts to have been harmless may not be second-guessed.

It is worth emphasizing that this section only applies to sentencing claims. Also, no one who asserts innocence of the underlying offense will see his options limited by this section. This section merely precludes a repeat of the state review process in federal court for sentencing errors that are not related to guilt of the underlying offense.

SECTION 7: UNIFIED REVIEW STANDARD

In 1997, the Supreme Court held that many of AEDPA's reforms would only apply to petitions filed after April 24, 1996. Lindh v. Murphy, 521 U.S. 320 (1997). Even now, because sometimes habeas litigation is so drawn out, there are pending habeas petitions to which AEDPA does not fully apply. This section would eliminate the need to apply the pre-1996 regime to any claims still pending today.

SECTION 8: APPEALS

This section addresses the delays that often afflict habeas appeals, as described by my colleague Ronald Eisenberg in his testimony before the House subcommittee (a copy of which is attached). Subsection 8(a) sets clear, generous but firm deadlines. A court of appeals will be required to decide habeas appeals within 300 days of the completion of the briefing. The court of appeals must also decide whether to grant a petition for rehearing or rehearing *en banc* within 90 days. If a three-judge panel grants rehearing, it must decide the case within 120 days after the grant of rehearing. If the full court grants rehearing, it must decide the case within 180 days.

This section accomplishes two other things as well. Subsection 8(l)(1) provides that the State is automatically entitled to a stay of the judgment while it appeals the

district court's grant of relief, which is sometimes the subject of unnecessary litigation. Subsection 8(b) bars courts of appeals from rehearing successive petition applications on their own motion. Current law bars petitioners from seeking rehearing of denials of such petitions, but some courts have concluded that they have the power to rehear these applications *sua sponte*. This provision closes the loophole.

SECTION 9: CAPITAL CASES

The AEDPA habeas reforms included a set of comprehensive provisions governing capital cases. See Chapter 154, Title 28. These provisions included special time requirements, tolling rules, and strict standards of review. The section also required the States to meet certain requirements, regarding standards for defense counsel, as a prerequisite to qualify for these special rules. The problem is, as of now the court that decides whether a State is eligible for Chapter 154 is the same court that would be subject to its various limits; not surprisingly, these courts have been reluctant to grant such eligibility.

The proposed subsection fixes this problem by placing the eligibility decision in the hands of the U.S. Attorney General, with review of his decision in the D.C. Circuit. In addition, the new provision grants district courts more time to review these capital petitions (15 months, instead of 6 months), and limits relief to claims implicating meaningful evidence of actual innocence.

SECTION 10: CLEMENCY AND PARDON DECISIONS

State clemency proceedings are an important "fail-safe" for catching fundamental errors and protecting the innocent. Formalized clemency procedures ensure that prisoners have better access to these mechanisms. Nevertheless, some prisoners have brought challenges to state clemency procedures in federal court, once again creating a perverse incentive for states to have any formal procedure at all. No one benefits from this result. This section bars lower federal courts from entertaining these challenges, and ensures that states will not be discouraged by the threat of litigation from formalizing and codifying their clemency procedures.

SECTION 11: EX PART FUNDING REQUESTS

Current law allows capital prisoners to request funds for their habeas litigation *ex parte* – that is, without the presence of the prosecution. This practice can create bias in the judge who hears the request (who does not hear the prosecution's side of the story) and sometimes results in funding for claims that have been waived or defaulted – because if the prosecution is not present, these objections cannot be made. This section bars *ex parte* requests, except to the extent necessary to protect attorney-client privilege. It also requires that the judge who hears the funding request not be the same judge who ultimately hears the petition.

SECTION 12: CRIME VICTIMS' RIGHTS

Because federal habeas petitions are often so far removed in space and time from the state proceedings – let alone the crime itself – the rights of victims are undervalued,

and their views are too often disregarded. This section extends to crime victims in habeas proceedings for state convictions the same rights made available last year to victims in federal prosecutions under the Crime Victims' Rights Act of 2004. These rights include the right to be present at court proceedings and the right to be notified of developments in a case.

SECTION 13: TECHNICAL CORRECTIONS

Subsection (a) of section 13 fixes a drafting error in the 1996 Act, concerning who has the authority to issue a certificate of appealability when a habeas petition is denied by the district courts. Section 2253 currently states that these certificates can be issues by a "circuit justice or judge," and the new language would replace this with "district or circuit judge." This change will not work a substantive change in the law, because the courts have been applying the law as if the new language were already included.

Subsection (b) designates the various paragraphs of section 2255, governing postconviction review for Federal prisoners, as subsections, thus making this rather long provision easier to navigate and cite.

SECTION 14: APPLICATION TO PENDING CASES

This section makes the changes of the Streamlined Procedures Act applicable to defendants who already have initiated federal habeas petitions. Although habeas corpus is a civil proceeding, and any changes to civil proceedings generally apply to pending cases, this is not the result reached by the Supreme Court when AEDPA was enacted.

See Lindh v. Murphy, 521 U.S. 320 (1997) (AEDPA reforms do not apply to cases pending at time of enactment). This section would prevent a similar result here, and ensure that the normal rules of construction would apply. The section also provides that if any deadline imposed by the proposed legislation would run from an event that preceded the Act's enactment, the deadline will be shifted to run instead from the date of enactment.

CONCLUSION

The various sections of the Streamlined Procedures Act address some real problems in the current practice of federal habeas corpus. I urge the Committee to give it careful consideration and to support its reforms. Thank you.

FEDERAL JUDGES ASSOCIATION

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VIA FACSIMILE

July 12, 2005

The Honorable Arlen Specter
Chair
Committee on the Judiciary
United States Senate
Room SD-224
Washington, DC 20510

Re: S. 1088-The Streamlined Procedures Act of 2005

Dear Senator Specter:

I am writing on behalf of the Federal Judges Association concerning S. 1088, the Streamlined Procedures Act of 2005, on which the Committee on the Judiciary has scheduled a hearing for Wednesday, July 13, 2005.

The Federal Judges Association only recently became aware of this legislation, which we understand was introduced by Senator Kyl on May 19, 2005, and is intended to reform federal habeas corpus review of state court convictions in both capital and non-capital cases. The Judiciary's practical experience with these important issues may be of value to the Committee on the Judiciary in its deliberations, and we therefore believe it would be appropriate for the Committee to afford the Judicial Conference of the United States a sufficient opportunity to consider and comment on S. 1088 before it acts.

I therefore respectfully request that, following its hearing on July 13th, the Committee extend its consideration of S. 1088 for an appropriate period of time in order to permit the Judicial Conference to review this legislation and provide comments to the Committee.

FJA

The Honorable Arlen Specter
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Thank you for your kind consideration of this request.

Sincerely,

Irene M. Keeley

IMK/esj
cc: Honorable Jon L. Kyl
Honorable Patrick J. Leahy
Michael O'Neil,, Majority Staff Director and Chief Counsel
Bruce Cohen, Minority Staff Director and Chief Counsel
Honorable Carolyn Dineen King

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

July 8, 2005

Honorable Arlen Specter
Chairman
Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515-6275

Re: Streamlined Procedures Act of 2005 (S. 1088)

Dear Chairman Specter and Senator Leahy:

I write on behalf of Federal Public and Community Defenders to voice our collective, grave concern over the above-referenced legislative proposal, S. 1088.

First, contrary to the impression advanced by its title, this bill is highly complex and if enacted, will unquestionably undermine Congress' already successful "streamlining" of habeas corpus procedures through the Antiterrorism and Effective Death Penalty Act of 1996. In the time that has passed since the AEDPA's enactment, federal courts have settled interpretative questions regarding the vast majority of the AEDPA's provisions, and developed a coherent body of law governing the adjudication of habeas corpus cases. This effort has resulted in a clear decline in the number of state prisoners filing habeas corpus petitions in the federal district courts. Over the last five years, the number of state prisoners seeking federal habeas corpus review has declined 13%; over the same period, the number of federal habeas corpus cases filed by state death-row inmates has declined 17%.[1] These declines are quite significant, given that the total state prison population has *increased* nearly 9% over the same period of time.[2] Should S. 1088 be enacted, years of protracted litigation would begin anew as the courts dissect its

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1 *See* **Administrative Office of the United States Courts, Judicial Facts and Figures, Table 2.9, available at http://www.uscourts.gov/judicialfactsfigures/table2.09.pdf.**

2 ***See* Bureau of Justice Statistics, U.S. Department of Justice, Prison and Jail Inmates at Midyear 2000 and at Midyear 2004, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim00.pdf and http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf.**

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provisions word by word. Enactment of S. 1088 would therefore thwart, rather than serve, its stated purpose of speeding federal habeas corpus review.

Proponents of S. 1088 provide anecdotal evidence of delays in certain habeas corpus proceedings, and argue the bill is necessary to eliminate these delays. In fact, federal court review of habeas corpus cases is disproportionately fast compared to other civil proceedings. In 2004, 12.6% of *all* civil cases were pending in the federal district courts three years or more.[3] In sharp contrast, even though state prisoner habeas corpus proceedings comprised 6.6% of all civil cases filed in 2004, they amounted to a mere 3.1% of civil cases pending for three years or more. And capital habeas corpus cases filed by state prisoners comprised *less than one percent* of civil cases pending three years or more.[4] The delays in the processing of federal appeals touted by S. 1088's proponents are similarly unsubstantiated. In 2004, the United States Courts of Appeal resolved over 56,000 appeals; of that 56,000, only 102 cases *of any kind* were pending before the federal courts for more than 12 months following submission.[5]

The speed with which the federal courts currently dispatch habeas litigants – including death-row inmates – should not be surprising. Congress has long required the federal courts to give priority to the adjudication of habeas corpus cases. Moreover, the AEDPA – especially its one-year statute of limitations, certificate of appealability requirement, and severe restrictions on second or successive motions – has allowed the federal courts to resolve many habeas corpus cases summarily. A recent example is *Howell v. Crosby*, ___ F.3d ___, 2005 WL 1554202 (11th Cir. July 6, 2005), where the Eleventh Circuit issued a one-page decision affirming the dismissal of a Florida death-row inmate's habeas corpus petition as untimely *less than a year* after he filed his petition in the district court. Indeed, in 2004, the federal appellate courts resolved 73% of all state prisoner habeas corpus appeals on procedural grounds; exactly half were terminated with the denial of a certificate of appealability, as provided for by the AEDPA.[6]

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3 *See* Administrative Office of the United States Courts, Judicial Facts and Figures, Table 2.04, available at http://www.uscourts.gov/judicialfactsfigures/table2.04.pdf.

4 *See* Administrative Office of the United States Courts, Judicial Facts and Figures, Table 2.11, available at http://www.uscourts.gov/judicialfactsfigures/table2.11.pdf; Judicial Business of the United States Courts, Statistical Table S-11 (Fiscal Year 2004), compiled by the Administrative Office of the United States Courts, available at http://www.uscourts.gov/judbus2004/tables/s11.pdf.

5 *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts, Statistical Table, Table B and Table S-5, available http://www.uscourts.gov/judbus2004/appendices/b.pdf and http://www.uscourts.gov/judbus2004/tables/s5.pdf.

6 *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts, Statistical Table, Table B-5A, available at http://www.uscourts.gov/judbus2004/appendices/b5a.pdf.

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Finally, it bears remembering that 99% of state prisoner habeas corpus cases are filed by inmates serving *non-capital* sentences who desire speedy review of their incarceration.[7] Delays in obtaining federal habeas corpus review may result in these prisoners fully serving a sentence pursuant to an unconstitutional conviction before they can obtain relief. For them, justice delayed is truly justice denied.

Accordingly, enactment of S. 1088, and the protracted litigation that will undoubtably follow, would complicate habeas corpus procedures that have *already* been streamlined, and would delay resolution of cases that are, at present, being adjudicated in a timely manner. Simply put, it does not live up to its billing.

S. 1088, however, is also misleading in more insidious ways. In many of its provisions, it appears to allow an exception to its "streamlining" efforts for those state prisoners who are actually innocent of the crimes for which they were convicted. In reality, it does not.

For all prisoners, Sections 2, 3 and 4 of S. 1088 strip the federal courts of jurisdiction to adjudicate claims that have not been exhausted in the state courts, are not contained in the federal petition at the time the one-year limitations period ends, or have been procedurally defaulted in the state courts. For death-row inmates, this "streamlining" is taken to the extreme. Section 9 strips the federal courts entirely of jurisdiction to consider *any claim* if the State seeking execution has been certified by the Attorney General as providing competent state postconviction counsel. The only real exception to these jurisdiction-stripping provisions would be for claims demonstrating by "clear and convincing evidence" that the prisoner is innocent of the crime AND "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence."[8]

But for most innocent persons who are wrongly convicted, it is almost always the case that their prior state counsel *could* have found the facts to establish innocence through due diligence, but simply failed to do so. Under S. 1088, even if these innocent persons presented the federal court with DNA evidence or other compelling evidence of innocence, the federal court

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7 See Administrative Office of the United States Courts, Judicial Facts and Figures, Table 2.9, available at http://www.uscourts.gov/judicialfactsfigures/table2.09.pdf.

8 **Sections 2, 3, 4 and 9 of S. 1088 also provide an exception for claims that rely on a new rule of constitutional law which the Supreme Court has made retroactively applicable to cases on collateral review. This "exception" is a mirage. Since 1989, when the Supreme Court enacted its nonretroactivity doctrine in *Teague v. Lane*, 489 U.S. 288 (1989), the Court has not made any new rule of constitutional law applicable to collateral cases. Moreover, the exceptions in sections 2 and 4 of the bill require not only a retroactive new rule of constitutional law, but *also* a showing of actual innocence by clear and convincing evidence.**

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would have no power to free that person from an unconstitutional incarceration. This stands in sharp contrast to current law, under which compelling evidence of innocence, standing alone, overcomes procedural bars and opens the door to federal habeas corpus review. It is my understanding from Federal and Community Defenders and others who have represented innocent death-row inmates as clients, and who have proven in federal habeas corpus proceedings that their clients are actually innocent, and who have watched with joy as these innocent clients were released from custody, that *none* of these truly innocent persons would be able to obtain relief under S. 1088. All would be executed.

Accordingly, S. 1088's so-called exceptions for "meaningful evidence of innocence" in Section 2, 3, 4, and 9 are nothing of the sort. Rather, the bill greatly increases the risk that a truly innocent person who has been wrongly convicted by a State court will remain unjustly incarcerated or – even more horrifying – executed. Surely, that risk is unacceptable.

Equally unacceptable is S. 1088's apparent contempt for the United States Constitution. In section after section, it strips the federal courts of jurisdiction to consider many legitimate claims that a State has unjustly incarcerated a United States citizen in violation of the Constitution.

Section 2 of S. 1088 creates highly technical requirements defining how a state prisoner must present his or her federal constitutional claims to the state court. Remember, 99% of state prisoner habeas corpus petitioners are serving non-capital sentences, and because there is no constitutional right to a lawyer in state postconviction proceedings, the vast majority of these prisoners have no lawyer at all to help them comply with Section 2's stiff requirements. It therefore becomes a procedural trap. If petitioners fail to meet its demanding requirements, they have no recourse. The federal court is powerless to hear their claim that their federal constitutional rights have been violated, no matter how compelling that claim may be.

Were Section 2 already the law of the land, Max Soffar would still be on Texas' death row. Mr. Soffar had the misfortune of being represented at trial by Joseph Cannon, an attorney best known for sleeping through large portions of the capital trial of another Texas death-row inmate, Calvin Burdine. At Mr. Soffar's trial, attorney Cannon and his co-counsel "fail[ed] to take the most elementary step of attempting to interview the single known eyewitness to the crime with which their client was charged," or even obtain the statements that eyewitness gave to police, which were sitting in the prosecutor's file and readily available to counsel had he only bothered to look. *Soffar v. Dretke*, 368 F.3d 441, 473-74 (5th Cir. 2004). They also "failed to consult with a ballistics expert although the State's case was largely based on the testimony of a ballistics expert to show a correlation between the physical evidence at the scene of the crime" and the State's theory of the case. *Id.* The Fifth Circuit found that this testimony and ballistics evidence would have been investigated but for counsel's "gross neglect or oversight," and that had it been presented to the jury, it would have so seriously undermined the State's case that the jury would not have convicted Mr. Soffar and sentenced him to death. *Id.* at 474, 478-9.

Indeed, a fair review of the evidence – including an utter lack of physical evidence linking Mr. Soffar to the crime and the sole eyewitness' failure to identify Mr. Soffar in two different police lineups – raises the strong inference that Mr. Soffar is innocent.

Were Section 2 of S. 1088 the law of the land, Mr. Soffar would have been executed. In State court proceedings, although Mr. Soffar argued that his trial counsel should have pursued this ballistics and eyewitness evidence, he did not spell out the claim in the exquisite detail required by Section 2. He therefore could not have obtained federal habeas corpus review of this claim. And, despite his trial counsel's gross ineffectiveness in violation of his federal constitutional right to counsel under the Sixth Amendment, and the strong likelihood that he is innocent of this offense, the federal court would be powerless to act.

Like Section 2, Section 4 of S. 1088 elevates procedure over substance in an utterly unacceptable manner. Section 4 would strip federal courts of jurisdiction to consider constitutional issues that were "procedurally barred" in state court, no matter how arbitrary the "bar" is, or whether the state court made a mistake in imposing the "bar," or whether the petitioner had a legitimate excuse for failing to comply with the state rule. And like Section 2, Section 4 would render the federal courts powerless to remedy gross violations of the United States Constitution.

For example, had Section 4 of S. 1088 been the law at the time, the federal courts would not have been able to remedy a state prosecutor's intentional discrimination in striking African-American prospective jurors during the capital trial of Arnold Holloway. The state appellate court ruled that this claim was procedurally barred, mistakenly believing that it had not been raised at the trial level in Mr. Holloway's state postconviction proceedings, when in fact it had been. *Holloway v. Horn*, 355 F.3d 707, 713-14 (3d Cir. 2004).

Under Section 4, Mr. Holloway would have been executed. Even though the state court "procedural bar" – its conclusion that Mr. Holloway failed to raise his federal constitutional claim in state postconviction proceeding – was just plain wrong, the federal court would have been powerless to consider Mr. Holloway's meritorious Fourteenth Amendment claim of racial discrimination, much less grant him relief.

Fred Jermyn would have met a similar fate. Mr. Jermyn was represented at his capital trial by an attorney who was less than two years out of law school. Trial counsel failed to take the most basic step of investigating Mr. Jermyn's childhood, which was replete with physical and psychological abuse. *See Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001). Had counsel done so, he would have uncovered evidence that as a child, Mr. Jermyn suffered gut-wrenching physical abuse from his father, which included beatings with a cat-o'-nine tails and a steel crutch. The family also banished Mr. Jermyn to an attic room, and forced him to eat from a dog food bowl while chained to a dog leash. Ultimately, Mr. Jermyn's family sent him to an orphanage, even though both of his parents were still alive. *Id.* at 273-74.

It was not until his second state postconviction motion that Mr. Jermyn raised his claim that trial counsel was constitutionally ineffective in violation of the Sixth Amendment in failing to present this compelling mitigating evidence during the penalty phase of his capital trial. The state courts ruled the claim was procedurally barred because Mr. Jermyn's first state postconviction lawyer – who was campaigning for an elected District Attorney position on a pro-death penalty platform at the time – failed to raise it in Mr. Jermyn's first state postconviction proceedings. In reaching this conclusion, the state courts retroactively applied a new procedural rule that had not been in place at the time the claim was defaulted. Section 4 would have eliminated federal review of this claim, and Mr. Jermyn would have been executed.

Mr. Jermyn would also have been executed under Section 6 of S. 1088. Section 6, if enacted, would strip the federal courts of the power to remedy unconstitutional sentences – including death sentences – if the state court found the constitutional violation "harmless" or "not prejudicial." The state courts found the failure of Mr. Jermyn's trial counsel to present this compelling evidence of mitigation was not prejudicial. 266 F.3d at 303-304. Under Section 6, that would have been the end of the inquiry. The federal courts would have no power to examine whether a state court correctly determined that the trial error was "not prejudicial."

The same would have been true for Delma Banks. At his capital trial, the prosecution hid evidence that Robert Farr, one of its two key witnesses at both the guilt and penalty phases, was a paid informant. It also hid evidence that it had given extensive coaching to its other key witness, Charles Cook. *See Banks v. Dretke*, 540 U.S. 668 (2004). Through Mr. Banks' direct appeal and state postconviction proceedings, the State affirmatively denied Mr. Farr's and Mr. Cook's links to police, and the State postconviction court denied Mr. Banks relief on his claim that the State's suppression of evidence favorable to the defense violated due process under *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.* at 683-84. The State postconviction court ruled that impeaching Mr. Farr would not have made a difference in Mr. Banks' sentence, and therefore any error was harmless.

Because of the State's deception, it was not until the United States District Court reviewing Mr. Banks' federal habeas corpus petition granted discovery and held an evidentiary hearing that the true relationship between the police, Mr. Farr and Mr. Cook was revealed. But under S. 1088, this information would *never* have come to light. Had Mr. Bank's federal petition been reviewed pursuant to S. 1088, the State postconviction court's finding of harmless error would have been the end of the inquiry, even though the State court was unaware of the true nature of Mr. Farr's relationship with the police when it issued that ruling. Under Section 6, the federal courts, including the United States Supreme Court, would have been powerless to consider the claim at all.

Of course, the State's successful concealment of this evidence during the State court proceedings would also have precluded federal court review of this claim under Sections 2 and 4

of S. 1088. His claim would be barred under Section 2 because his claim was not presented to the state courts in the detail it requires. His claim would be barred under Section 4 because the State postconviction court found the claim "procedurally barred" in that Mr. Banks had not presented sufficient evidence to substantiate his claim. Of course, the reason Mr. Banks did not present all of the facts in support of his claim to the State courts was because the State had hidden those facts in violation of the Fourteenth Amendment. But S. 1088 does not take such considerations into account. Accordingly, even though the United States Supreme Court concluded that the State had unconstitutionally concealed favorable evidence from Mr. Banks and that, in light of that evidence, Mr. Banks would likely not have been sentenced to death, under S. 1088, Mr. Banks would be "streamlined" to the executioner's chamber.

The writ of habeas corpus has been called "the Great Writ" because it acts a vital systemic check upon the States and their application of fundamental federal constitutional protections. Lost somewhere in S. 1088s "streamlining" of procedures is the very real truth that every year, the States wrongly incarcerate United States citizens in violation of the United States Constitution. The AEDPA and existing habeas corpus jurisprudence have struck a careful balance between the need to eliminate delay and respect the State courts while also protecting the federal constitutional rights of this country's citizens. The Federal Public and Community Defenders greatly fear that S. 1088 so upsets this balance as to render the Great Writ but a ghost of its former self.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender

cc: Members of the Senate Judiciary Committee

TWH/cgp

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Contact: **Trevor Miller**
(202) 224-8657

Statement of U.S. Senator Russ Feingold

At the Senate Judiciary Committee Hearing on
"Habeas Corpus Proceedings and Issues of Actual Innocence"

July 13, 2005

Mr. Chairman, thank you for holding this hearing today. I am very pleased that these witnesses will testify on a bill, the Streamlined Procedures Act, that could have very serious implications for our criminal justice system, and in particular for the ability of death row inmates to have their constitutional claims heard in federal court. I cannot overstate the significance of this bill, about which I have grave concerns. It would not only rework federal habeas law, it would dramatically cut back on the jurisdiction of our federal courts.

I understand the concern about lengthy appeals in cases where prisoners bring federal habeas claims. But more than 115 people sentenced to die have been exonerated and released from death row, sometimes years after their convictions. And I have no doubt there are others we do not yet know about. Often, evidence of innocence does not come out until years after a conviction, and habeas is the only legal avenue that inmates have left to them.

Last year, a man in Texas was exonerated 17 years after he was convicted – and only after a federal court considering his case on a habeas appeal threw out the conviction. The prosecutor who could have retried him instead apologized, saying "I'm sorry this man was on death row for so long and that there were so many lost years." And just this week, the St. Louis Post-Dispatch reported that a local prosecutor has reopened an investigation into a 1980 murder because the evidence against the man convicted of the crime had fallen apart. That man had been sentenced to death, and he was executed by the state of Missouri 10 years ago. Yet now, 25 years after the crime and 10 years after his execution, very serious questions about his guilt are now being raised. These are extremely serious issues.

I am very seriously concerned about the effect this bill would have on inmates who argue they did not commit the crime of which they were convicted. But this is not just about claims of innocence. This bill also would prevent federal courts from evaluating serious constitutional flaws in cases where the ultimate punishment of death is at issue. One study found that 68 percent of all death penalty cases from 1973 to 1995 were overturned due to serious constitutional errors. A number of recent U.S. Supreme Court cases have found the proceedings by which an individual was convicted of a capital crime or sentenced to death to have violated the Constitution – and they have done so in the review of federal habeas proceedings. Under the law as this bill

would revise it, the federal courts would not even have had the power to adjudicate these claims, and the errors would have gone unaddressed.

Finally, I am concerned about this bill because it would fundamentally realign the role of federal courts in criminal cases. Our legal system has long recognized the importance of reducing constitutional error when an individual's liberty or life is at stake, by allowing even state inmates to challenge the constitutionality of their imprisonment in federal court through habeas corpus. This bill would undo that fundamental premise, stripping federal courts of the ability to hear many federal claims. This bill would not make the habeas process more efficient, as its proponents claim. It would prevent federal courts from hearing a great number of potentially meritorious claims in cases where our justice system must be most careful.

I sincerely hope, Mr. Chairman, that this Committee will listen closely to these witnesses and consider this bill carefully and thoroughly. There is no reason to rush to judgment on this piece of legislation.

530 Fair Oaks
Oak Park, IL 60302

July 12, 2005

Via Fax

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Re: Streamlined Procedures Act

Dear Senator Specter:

I am a former federal prosecutor in Chicago, and presently a partner at the law firm of Sidley Austin Brown & Wood LLP ("Sidley" or "the Firm"). I write to express my concern regarding the Streamlined Procedures Act ("the Act"), legislation being considered by the Senate Judiciary Committee tomorrow. While I have not yet studied the entirety of the Act, I know enough about its provisions to express grave concern about its implications, and to urge that it not be adopted wholesale by the Committee. At a minimum, the Committee should take steps to ensure that sufficient time is devoted to enable careful and deliberate analysis of the Act's many critical provisions.

In my close to twenty years of work relating to federal law enforcement, I have seen in many contexts how federal habeas review has served to protect citizens in our free society. First, I served as a law clerk to the Honorable Ann C. Williams in the United States District Court for the Northern District of Illinois. During that clerkship, I participated in three cases in which Judge Williams granted state convicts' petitions for federal habeas relief on the basis of her conclusion that their constitutional rights had been violated by state courts during the criminal process.

Second, after serving for seven years as an Assistant United States Attorney in Chicago, I joined Sidley in 1996, and subsequently was engaged to represent Indiana death-row inmate Obadyah Ben Yisrayl in connection with his efforts to seek federal habeas relief. Mr. Ben Yisrayl had been convicted in 1992 of murder in two separate murder trials, and been sentenced to death in both. In 2001 and 2002, we filed two petitions for federal habeas relief in the United States District Court for the Northern District of Indiana. In one case, the district court issued the writ and ordered a new trial based, in part, upon the state prosecutor's commenting during closing argument on our client's decision not to testify at trial (that decision is presently on appeal before the United States Seventh Circuit Court of Appeals). In the other case, the district court denied issuance of the writ, and we appealed that decision. While that appeal was pending before the Seventh Circuit, the Indiana Supreme Court—*sua sponte* on the basis of subsequent legal developments—revoked our client's death sentence and ordered him

resentenced. Consequently, as a result of federal habeas, our client is alive today, and not presently under a death sentence.

Finally, the Firm has a long-standing commitment to *pro bono* and public service. We presently represent ten state inmates on death row in connection with various levels of post-conviction review. The lawyers involved with these representations are familiar with the problems in state systems, and perceive that the federal system is sometimes the only sure venue for ensuring that federal constitutional rights are protected.

Had the Act been in effect during our representation of Mr. Ben Yisrayl, he likely would not have been eligible for habeas review, and might not be alive today. In its present form, the Act would foreclose many, if not all, of our existing death-row clients from ultimately obtaining the federal review likely necessary for them to get the process they are due.

I therefore urge the Committee to reject the Act in its present form, and to ensure that adequate legislative time and effort is devoted to careful scrutiny of the Act's many problematic provisions.

Please let me know if you or any other member of the Committee has any questions they would like me to answer.

Respectfully,

John N. Gallo

cc: The Honorable Patrick J. Leahy (by fax)

July 12, 2005
8112 Coach Street
Potomac, MD 20854

Via Fax

The Honorable Arlen Specter
United States Senate
Chairman, Senate Judiciary Committee
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am a partner in a large law firm, a former federal court law clerk, and a former staff member of both personal and committee staffs for the U.S. Senate and House. I write to express my strong reservations and concern about S. 1088, the "Streamlined Procedures Act of 2005." (the "Act"). Based on my initial review of the Act, I am very concerned about several of its provisions, and their potential effect on the availability and efficacy of federal habeas corpus review of criminal convictions and sentences. I urge you and the Judiciary Committee to analyze the Act and its several far-reaching provisions carefully and with great caution and skepticism. The Act, which seeks to alter, fundamentally, protections of the most basic rights of Americans by truncating federal court jurisdiction and authority to avoid unlawful deprivation of life or liberty, deserves and requires careful, serious, and deliberate consideration.

I know from personal experience that federal habeas corpus review is an essential bulwark against unjust and unlawful deprivations of individual rights and liberty. During my service as a law clerk for a federal district court and for a federal court of appeals, I was involved in several cases in which state criminal processes manifestly failed to provide an accused person with due process or did not protect that person's basic constitutional rights, and the only way those rights were vindicated was through federal habeas corpus review. Without independent federal judicial review of state court convictions, the defendants in those cases would have been unjustly imprisoned or executed.

As a lawyer in private practice, I have served as counsel to defendants in two habeas corpus cases before the United States Supreme Court. In both of those cases, the defendant was convicted and sentenced to life in prison, based on fundamentally defective and unfair state court proceedings. In both of those cases, defendants availed themselves of direct review in state court, and state habeas corpus review, but at every level those proceedings were superficial and conducted no meaningful examination of the trial court proceedings. In both cases, the defendants pursued their state remedies properly and diligently, but were effectively denied any substantive review of their cases. Ultimately, the Supreme Court reversed the convictions in both cases, resulting in the freeing of one defendant and a reduction in the sentence of the other. Without federal habeas corpus, one of those men, an indigent American citizen, would have spent the remainder of his life in jail based on an erroneous and unconstitutional state trial court conviction.

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To be sure, there were some abuses of the federal habeas corpus process by prisoners in the past. Today, however, the Antiterrorism and Effective Death Penalty Act, in combination with strict procedural rules and bars adopted by the Supreme Court, have effectively eliminated such abuses. What remains under the present state of the law is the bare minimum opportunity for federal collateral review that is consistent with our nation's commitment to liberty and fundamental fairness, and our opposition to arbitrary deprivation of a person's life or liberty. Any further limitation of federal court powers to review state criminal convictions would endanger the rights of all Americans, any one of whom might be wrongfully accused or convicted.

The title of the Act suggests that it is procedural, housekeeping bill. It is not. Anyone who has read the bill and is familiar with habeas corpus law will find that the Act would impose significant substantive limits on federal court jurisdiction and power to consider fundamental constitutional claims, and would eliminate federal court consideration of the specific facts and circumstances of individual criminal convictions or sentences rendered in state court, so long as the Executive branch has made a generalized finding that a State generally provides adequate legal counsel for indigent defendants.

Although I have not had an opportunity to conduct a full review of the proposed Act in its entirety, it appears to me that the bill evinces a fundamental mistrust of federal courts. In light of experience and other recent action of the Congress, this is difficult to understand. While there are certainly exceptions, our federal courts are generally understood, on the whole, to be more competent, efficient, effective, and insulated from political pressure than most state courts. Recognizing this fact, Congress recently enacted a law that will have the effect of moving most putative class actions – which have been subject to rampant abuse in state courts – to federal court. This recognition of the superiority of federal courts is difficult to reconcile with the Act's effort to deny federal courts jurisdiction to ensure that state court proceedings – not just overall, or on average, but in each individual case – adequately protect Americans' most fundamental rights to life and liberty.

The concerns described above are particularly acute in capital cases. Based on the American experience in recent years (for example, using new DNA testing techniques), we know that our criminal justice system occasionally metes out erroneous convictions and sentences. Once a person has been executed, however, the possibility of correcting an erroneous sentence or conviction is ended. Surely, there are few greater injustices than executing a person who has been wrongly convicted. Federal habeas corpus – the Great Writ – provides a relatively low-cost way to minimize such miscarriages of justice.

The Act, as written, would eviscerate federal habeas corpus, and, more broadly, set a dangerous precedent of eliminating federal court jurisdiction over determinations of fundamental federal rights in those instances in which Congress does not approve of federal court action. What is truly sobering is the potential effect on the rights of ordinary citizens and businesses of a congressional practice of stripping courts of jurisdiction over matters that are, under the popular passions of the moment, out of favor. Moreover, as the Terry Schiavo case illustrated, legislating court jurisdiction based on projections of substantive results is not only unwise and

inconsistent with separation of powers and basic principles of federalism, it is also an unreliable way to influence results.

I urge you and the Judiciary Committee not rush to judgment or yield to political expediency on the important, fundamental changes proposed by the Act. Deliberations on the Act should be conducted in the context of full acknowledgement and understanding that changes and limitations on individuals' rights and access to courts apply not only to the "other" or some faceless criminal element, but to every American.

Thank you for your time and are in consideration of this important matter.

Sincerely,

Paul A. Hemmersbaugh

cc: Senator Patrick J. Leahy (via fax)

Statement of Mary Ann Hughes

United States Senate
Committee on the Judiciary

"Habeas Corpus Proceedings and Issues of
Actual Innocence"
July 13, 2005

My husband and I are the parents of Christopher Hughes. Chris was senselessly and brutally murdered at the age of 11 by Kevin Cooper, an escaped convict with a lengthy criminal record. The legal proceedings against Cooper have now taken twice as long as the time our young son was alive. Before I talk about how the Streamline Procedures Act would have affected this case, I want to share with you who our son was and how he died at the hands of Cooper. I want you to be able to understand what the delays in this case have meant to us. It is our hope that our story will serve to bring about changes so that other families will not have to endure what we have been through.

Christopher was a beautiful little boy. He had just completed the fifth grade at a local Catholic school. His classmates later planted a tree in his memory at the school. Chris swam on the swim team and dreamed of swimming for the University of Southern California and being in the Olympics. He loved his younger brother, and in typical brotherly fashion would tease him one minute and be his best friend the next. Chris' younger brother is now 28 years-old. He has missed Chris every day since he was murdered. Our younger son was not yet born when Chris was murdered. I was pregnant during part of Cooper's trial with our third son. When he was born we gave him the middle name Christopher after the brother he never knew. Both boys have only in the last few years been able to face what happened to their brother. As the years have passed, we are reminded that Chris never got to finish grammar school, go to a prom, marry, have children of his own, or pursue his dreams.

On Saturday, June 4, 1983, Chris asked me for permission to spend the night at the home of his friend, Josh Ryen. We lived in what was then a very rural neighborhood. Josh was the only boy nearby who was really close to Chris' age and so they formed a bond. We were good friends with Josh's parents, Doug and Peggy Ryen. The Ryens lived just up the road from our

home with their 10-year-old daughter Jessica and eight-year-old Josh. The last time I saw Chris alive he and Josh were riding off on their bicycles toward Josh's house. They were excitedly waving because they were so happy I had given Chris permission to spend that night with Josh. The only thing Chris had to remember was to be home Sunday in time for church. The next time I saw Chris was in a photograph on an autopsy table during Cooper's preliminary hearing.

Unbeknownst to anyone, Cooper had been hiding in a house in Chino Hills just 126 yards from the Ryen's home. He had escaped two days earlier from a minimum security facility at a nearby prison. When Cooper was arrested for burglary in Los Angeles he used a false identity. His identity and criminal past should have caught up with him before he was wrongly assigned to the minimum security portion of the prison. The prison, however, mishandled the processing of an outstanding warrant for Cooper for escape from custody in Pennsylvania. He was being held pending trial for the kidnap and rape of a teenage girl who interrupted him while he was burglarizing a home. While staying at the hide-out house near the Ryens, Cooper had been calling former girlfriends, trying to get them to help him get out of the area. A manhunt was under way for Cooper, but the rural community surrounding the prison was never notified of the escape.

The failure of the California prison-system to protect the surrounding community from a dangerous felon marked the beginning of our family and community's being let down by our government. Within a few hours of Cooper's escape, prison officials realized who Cooper was and how dangerous he was. Nevertheless, they still failed to alert the community that he was at large. Our frustration and disappointment with our government's failings has only grown since that time as Cooper's case continues to wind its way down a seemingly endless path through our judicial system.

The morning following the murders, I remember being mad at Chris because he had not arrived home on time as promised so we could attend church. Then my anger turned to worry. I sent my husband Bill up to the Ryen home. He saw that the horses had not been fed, and that the Ryen station wagon was gone. Uncharacteristically, the kitchen door was locked, so my husband walked around the house. He looked inside the sliding glass door of the Ryen's master bedroom. He saw blood everywhere. Peggy and Chris were lying on the ground and Josh was lying next to them, showing signs of life but unable to move. My husband could not open the sliding glass door, so he ran and kicked open the kitchen door. As he went into the master bedroom, he found 10-year-old Jessica lying on the floor in fetal position in the doorway, dead. He saw Doug and Peggy nude, bloodied, and lifeless. When he went to our son Chris, he was cold to the touch. Bill then knew that Christopher was dead.

My husband then forced himself to have enough presence of mind to get help for Josh, who miraculously survived despite having his throat slit from ear to ear. Josh, only eight years-old, lay next to his dead, naked mother throughout the night, knowing from the silence and from the smell of blood that everyone else was dead. He placed his fingers into his throat, which kept him from bleeding to death during the 12 hours before my husband rescued him.

Everyone inside the home had been repeatedly struck by a hatchet and attacked with a knife. Christopher had 25 identifiable wounds made by a hatchet and a knife. Many of them were on his hands, which he must have put against his head to protect himself from Kevin Cooper's blows. Some were made after he was already dead. No one should know this kind of horror. That it happened to a child makes it even worse.

The killer had lifted Jessica's nightgown and carved on her chest after she died. The killer also helped himself to a beer from the Ryen's refrigerator. We wondered what kind of

monster would attack a father, mother, and three children with a hatchet, and then go have a beer. That question has long since been answered, but 22 years later we are still waiting for justice.

One way that things could have been different in our case under the Streamlined Procedures Act is that victims would have the same rights in federal habeas proceedings as victims have in criminal cases in the federal courts. In other words, victims or their surviving family members would be heard from by the federal courts. There was no indication that the en banc Ninth Circuit majority ever gave even a moment's consideration to the impact upon the victims and their families when they granted yet another stay in the case in 2004. In this way, the bill would have made a difference. It would have prevented federal courts from making decisions in federal habeas litigation that affect people without ever knowing or thinking about them. Judge Huff recently afforded us an opportunity to address her at the end of 14 months of proceedings in her courtroom. My husband and I spoke to the court, as did Josh, who is now 30 years old.

While I know that Cooper is the one who murdered my son, I will always bear the guilt of having given Chris permission to spend the night at the Ryen's house. I will always feel responsible for sending my husband to find the bodies of our son and the Ryen family. It is a guilt similar to the guilt that Josh feels to this day because he had begged me to let Chris spend the night. He thinks that Chris would still be alive if he had not spent the night. Of course, Cooper is responsible for all the pain and suffering that he inflicted that night and the continued pain that has followed, but it does not help stop the pain and guilt. Kevin Cooper is still here over 22 years later – still proclaiming his innocence and complaining about our judicial system.

As Josh explained when he finally got a chance to speak to the Judge about how he has been affected by Cooper's crimes: Cooper never shuts up. We continually get to hear more bogus claims and more comments from Cooper and his attorneys. Over the years I have learned to know when something has happened in Cooper's never-ending legal case: the calls from the media start up again, or, at times, the media trucks just park in front of our house. We have no opportunity to put this behind us – to heal or to try to find peace – because everything is about Cooper. Our system is so grotesquely skewed to Cooper's benefit and seemingly incapable of letting California carry out its judgment against him.

It is important to understand how obvious it has been for over two decades that Cooper committed these horrible, senseless, and brutal crimes. This has never been a "who done it" case by any stretch of the imagination, despite all the publicity and antics by Cooper and his attorneys. The California Supreme Court understandably characterized the volume and consistency of evidence proving Cooper guilty as "overwhelming."

The Ryen family and Chris returned to the Ryen home from a neighbor's barbecue about 9:30 that Saturday night. None except for Josh were ever seen alive again. Cooper could observe the Ryen home from the hideout house next door. He knew it was a home and a family lived there because he had been watching the Ryen home for the two days since his escape. Cooper also had a motive for the crimes. The phone records from the hideout house, combined with statements Cooper's former girlfriends gave to police, showed Cooper was trying to get help to get out of the area. Cooper found out just before the Ryens and Chris returned to the Ryen home that night that no money and no help was coming his way, despite his numerous phone calls to former girlfriends. Forensic evidence established Cooper's presence in the hideout house (footprints, fingerprints, and semen). The murder weapons came from the hideout

house, and other evidence showed that the killer returned to the hideout house after the murders to wash up.

Cooper told the jury that he simply walked out of the hideout house the same night as the murders. He said he never went inside the Ryen home, a mere 126 yards away. He claimed he was never inside the Ryen station wagon that was stolen the night of the murders. Not surprisingly, the jury did not believe him. Cooper was asking the jury to believe that some hypothetical killer entered Cooper's hideout house within a short period of time of his vacating it, selected a hatchet and other weapons, went and attacked an innocent family 126 yards away, returned to the hideout house to wash up, and then stole the Ryen family car and drove it in the same direction that Cooper admittedly traveled to Mexico.

A single drop of blood inconsistent with the victims' blood was found inside the Ryen home on the hallway wall immediately adjacent to the entrance to the master bedroom. Cooper's own expert excluded anyone other than an African-American as the source of the drop of blood. (The Ryens were white.) A serology analysis showed that the drop of blood was a rare type and Cooper had that same rare blood type. The distinctive prison-issued tobacco that Cooper admitted having when he escaped from prison was found in the hideout house and in the Ryen station wagon. A butt from a hand-rolled cigarette found in the station wagon with the distinctive prison-issued tobacco had saliva from a non-secretor. Only 20 percent of the population, including Cooper, are non-secretors. Another cigarette butt found in the car was a manufactured cigarette matching the brand of cigarettes taken from the hideout house; it also had saliva from a non-secretor. A pubic hair consistent with Cooper's hair was found in the Ryen station wagon. Plant burrs found in the station wagon were from vegetation that grew between the hideout house and the Ryen home. The burrs were also found in the hideout house and

underneath Jessica's Ryen's nightgown. Jessica's killer had pulled up her nightgown to carve on her chest after she died and then lowered her nightgown. A button similar to those on the prison-issued jacket Cooper was wearing when he escaped was found with blood on it on the floor of the hideout house. A shoe print made by a particular make and model of shoe that was issued by the prison to Cooper, and that he admitted at trial to wearing at the time of his escape, made a partial print in blood on a sheet on the floor of the Ryen master bedroom, and another print on the cover to the spa outside the sliding glass door leading into the Ryen master bedroom, and a third shoe print inside the hideout house.

In other words, Cooper's defense has always asked that we believe the utterly ridiculous scenario that a hypothetical killer coincidently entered the same house where an escaped convict had just been hiding shortly after the convict departed, selected a hatchet and other weapons, committed a brutal murder of a family, returned to clean up before stealing their car, **and** that the hypothetical killer was African-American and had Cooper's rare blood type, wore a prison-issued jacket and the same make and model of prison-issued shoes that Cooper wore, had the same shoe size as Cooper, had hair like Cooper's, and was a smoker and a non-secretor like Cooper, used distinctive prison-issued tobacco, and fled in the Ryen station wagon in the same direction that Cooper traveled.

In 2001, after years of Cooper contending that he was innocent and his highly publicized demand for DNA testing, the State agreed to post-conviction testing. The evidence to be tested was identified by Cooper's own nationally recognized expert as the most significant pieces of evidence in the case in terms of determining guilt or innocence. The results confirmed Cooper's guilt. The single drop of blood that had been identified through serology analysis at the time of trial as belonging to a person of African-American ancestry with the same rare blood type as

Cooper was consistent with Cooper's DNA profile; the probability of a random match with the population was a staggering **one in 310 billion**. The saliva on the cigarette butts in the Ryen station wagon also matched Cooper's DNA; the odds of a random match with the general population was **one in 19 billion** for the hand rolled cigarette and one in 110 million for the manufactured cigarette butt. At trial, Cooper claimed that a t-shirt that had been recovered from along side the road nearby the Canyon Corral Bar belonged to the "real killer." The post-conviction DNA testing confirmed that the T-shirt had smears of blood belonging to the victims as well as Cooper's blood. The probability of a match in the general population to Cooper's DNA profile on the t-shirt is one in 110 million, and the random occurrence within the general population of a match to the victim's blood would be one in 1.3 trillion. The t-shirt, which was never used against Cooper at trial, was new damning evidence of his guilt: his blood was present on the same item of clothing as the victims' blood.

The fact that the overwhelming evidence of Cooper's guilt presented at trial was now bolstered by undeniable scientific evidence evoked a predictably absurd response from Cooper. Cooper now claimed that his blood had been planted on the shirt by police and the drop of blood found at the crime scene had been tampered with. Of course, Cooper could not explain how or why police would plant a minute amount of blood on the t-shirt only to never use it as evidence against him at trial. Moreover, this evidence had been in police custody since 1984. Apparently, these supposed rogue police officers also anticipated the development of the Nobel Prize-winning science that would enable Cooper to have the blood tested for DNA. Cooper also could not explain how the police could have planted his blood at the crime scene within a few hours of discovering the bodies, while he was still at large.

The fact that Cooper's claims were patently absurd, however, did not prevent him from receiving yet another round of appeals from the federal courts. In February 2004, the Ninth Circuit authorized Cooper file another full round of habeas corpus appeals on the ground that he showed "clear and convincing" evidence that he could be "actually innocent." I simply do not see how the judges could have reached such a conclusion.

Our story is one of a judicial system so out of balance in favor of the **convicted** that it literally enables them to victimize their victims and their families all over again through the federal judicial system. We understood the rights of an accused and that Cooper's rights took precedence over ours as he stood trial. His trial was moved to another County because of the publicity surrounding the horrendous crimes. I had to drive a long distance to another County to watch the trial as it could not take place in our County. Cooper's defense attorney spent an entire year preparing to defend Cooper at trial. Everything was about Cooper's rights and none of our sensibilities or concerns could be dignified because Cooper had to have a fair trial. We understood and we waited for justice. In California, Cooper's appeal was automatic because he had received the death penalty for his crimes. The appeal took six years to conclude. We understood the need for a thorough appeal and we waited for justice.

By 1991, Cooper had received a fair trial and his appeal had been concluded. The California Supreme Court aptly observed that the evidence against Cooper, both in volume and consistency, was "overwhelming". Since then, we have waited and watched as the United States Supreme Court has denied Cooper's eight petitions for writ of certiorari and two petitions for writ of habeas corpus, and the California Supreme Court has denied Cooper's seven habeas corpus petitions and three motions to reopen Cooper's appeal. The Ninth Circuit affirmed the denial of Cooper's first federal habeas petition, and denied him permission to file a successive

petition in 2001, and again in 2003. But then, on Friday night, February 6, 2004, Cooper's attorneys filed an application with the Ninth Circuit requesting permission to file a successive habeas petition.

A three-judge panel of the Ninth Circuit denied Cooper's application to file a successive petition on Sunday February 8, 2004. Cooper was scheduled to be executed at one minute after midnight on Tuesday February 10, 2004. On Monday February 9, 2004, my husband and I made the trip to Northern California from our home in Southern California. Relatives of the extended Ryen family flew in from all over the Country. Josh Ryen, now 30, left for dead at the age of eight, his entire immediate family murdered, drove hundreds of miles to reach the prison to witness the execution of Cooper. We all expected that finally, this case would be brought to a close.

Since the murder of Chris, holidays and special days are never totally joyful. They serve as a painful reminder that Chris is not with us, and of how he was taken from us. Otherwise happy occasions with our surviving children often are overshadowed by what Chris should have been able to experience in his life but for Cooper's choices and actions. When I learned from the prosecutor that Cooper's execution was going to be set for February 10, 2004, I asked to have it changed because February 10th is my birthday. The prosecutor explained that it was not possible to accommodate my request because the date had been chosen in order to coordinate the staffing of the hundreds of people who must be on duty when an execution is scheduled to be carried out, *i.e.* the personnel at the prison, at the appropriate state and federal courts, and at the California Attorney General's Office. With that explanation, I at least hoped the date would be one that would be remembered for justice being served at long last. Sadly, that date is now identified with yet another example of a judicial system gone wrong.

If the Streamlined Procedures Act had been law in February 2004, Cooper would have been executed as scheduled. My birthday would not forever be a reminder of how it felt to believe that this case would finally end – only to have it begin again, 21 years after it first began. Today, my family and Josh Ryen are left to wonder if there will ever be justice for my son and the Ryens.

The reason that Cooper would have been executed as scheduled under the SPA was because a three-judge panel that was familiar with his crimes and the lengthy procedural history of his case already had rejected Cooper's request to pursue yet another habeas petition in the federal District Court. Unfortunately, since the Streamline Procedures Act was not the law, the Ninth Circuit was left free to decide that Congress' prior habeas reforms, which provided that a three-judge panel has the final word on whether a successive federal habeas petition will be allowed, did not really mean what they said. While Congress specified that there would be no petitioning for rehearing of the three-judge panel's decision, the Ninth Circuit decided that what Congress really meant was that a rehearing would be just fine if it was the appellate court's idea to have a rehearing as opposed to one of the parties.

Of course, the problem with the Ninth Circuit's logic is that it resulted in judges who had absolutely no familiarity with Kevin Cooper's crimes or the history of his case making a last-minute decision about it. Only hours before Cooper's scheduled execution, these judges would decide whether he would get yet another round of federal habeas review. Not surprisingly, having the decision made by the en banc panel that did not include a single judge with any familiarity with Cooper's case did not improve the quality of justice. Cooper's application for a successive petition and supporting exhibits was deliberately presented late in the process and was

over 1,000 pages long. It contained nothing meritorious or worthy of review. The outcome was a gross miscarriage of justice.

The Ninth Circuit's authorization for the filing of a successive habeas petition resulted in further proceedings in the federal District Court which served to reveal exactly how wrong it was to give Cooper yet another round of federal review. After 14 months of proceedings in the District Court, we now know that the entire premise of the Ninth Circuit's decision to grant Cooper the opportunity to file yet another federal habeas petition was predicated on false assumptions and mistaken impressions. The en banc majority of the Ninth Circuit decided in a matter of a few hours that two "quick and definitive scientific" tests could be conducted with respect to Cooper's continuing claim of actual innocence. The subsequent proceedings in the District Court showed the tests were anything but quick. After considerable time and expense, both tests were conducted and neither supported Cooper's claim of innocence. So here we are, 17 months after this case should have been put behind us, and law enforcement, prosecution and judicial resources continue to be wasted on a guilty man whose crimes were committed over 22 years ago. The same judge who decided Cooper's first federal habeas petition just issued a 160 page decision explaining in detail why he is not innocent and why he is not entitled to relief on any of the claims that the Ninth Circuit allowed him to file. Cooper is now asking for his numerous baseless federal habeas claims to be certified for appeal to the Ninth Circuit. His attorneys apparently envision many more years of appeals.

The claim that the majority of the en banc panel identified as satisfying the "actual innocence" test enacted by Congress in 1996 that enabled Cooper to return for yet another round of federal habeas review was his claim that the prosecution withheld exculpatory evidence relating to the shoe prints in the Ryen house. Cooper left a partial print in blood on the Ryen's

bedsheet, a print in dust on the spa cover outside the sliding glass door leading into the Ryen masterbedroom, and another shoe print in the hideout house. The shoe that Cooper wore when he left the damning shoe print evidence was a make and model that was issued to him by the prison. He also admitted at trial that he was wearing these shoes at the time of his escape from the prison, just days before he murdered our son and the Ryens. The fact that Cooper admitted to wearing the particular make and model of shoe did not prevent the en banc majority of the Ninth Circuit from deciding that "information" from the former Warden, if believed by the jury, would mean the jury "would have known that Cooper was almost certainly not wearing" the same brand and model of shoe responsible for the distinctive shoe prints inculpating him in the brutal murders. Of course, nothing in Cooper's papers supported that conclusion. Not even Cooper's attorneys argued that the former Warden's "information" would have meant the shoes could not have been issued by the prison, yet this is the conclusion that caused the en banc majority of the Ninth Circuit to let Cooper file yet another habeas petition in the District Court.

Cooper's attorneys' contention was, of course, completely false but, the Ninth Circuit en banc panel, unfamiliar with the details of the case, managed to buy into the version of events conjured up by Cooper's counsel. The Ninth Circuit could not have gotten everything so wrong had they not undertaken to decide such an important matter over a span of just a few hours, rather than leaving matters to the three-judge panel that was actually familiar with Cooper's case.

What Cooper's attorneys actually argued in their eleventh hour filing was that the murder shoes had been purchased by the prison at Sears and were readily available to the public in retail stores. They based this allegation on the former Warden's "personal inquiry," which she supposedly had conducted and conveyed to the San Bernardino County Sheriff's Department before trial. Of course, as the former Warden testified later in front of Judge Huff, she did not

conduct a "personal inquiry." Instead, she just asked someone and they told her information that was inaccurate. The corporate records and prison purchase records introduced at trial clearly showed the prison bought the shoes directly from the manufacturer, and the sales records of the corporation showed sales only to state and federal institutions such as the military, forestry service, and prisons such as that from which Cooper had escaped before the murders.

A greater familiarity with the evidence in the case would have enabled the judges on the en banc panel to understand that Cooper admitted to having been issued the make and model of shoe that left the incriminating foot prints, and he admitted to wearing the shoes when he escaped only days before the murders. Those facts, combined with the fact that the prints were consistent with Cooper's shoe size, along with all the other evidence incriminating him, is what made the shoe prints damning – not whether the prison bought the shoes at Sears or whether anyone else could buy the shoes at Sears. As if missing this point were not infuriating enough, it also turns out that everything the former Warden said to Cooper's attorneys is absolutely wrong, and that the defense as well as the trial jury knew all along where the prison had purchased the shoes and who else had purchased those kinds of shoes. Imagine this scenario: everything is stopped just hours before an execution, after two decades of litigation, because of inaccurate hearsay offered by the same warden who put a violent offender in the minimum security portion of the prison, allowing Cooper to escape and commit the murders in the first place.

Not only was the entire claim misunderstood and false, the Ninth Circuit also was misled as to how long the defense knew about the "facts" supporting the claim. The time frame in which the defense learns something is a critical fact to be considered when something is asserted at the last minute after years of litigation. The importance of when something is discovered in the context of an application to file a successive petition is evident from the decision of the en

banc majority, which expressly states when it believed Cooper's defense learned of the "new" information. The decision expressly noted that a sworn declaration by Cooper's counsel showed that the Cooper defense did not become aware of former Warden Carroll's "information" until the date on her declaration, which was January 30, 2004. If we were not already completely disgusted with our judicial system, we certainly were when we sat in Judge Huff's courtroom while a Cooper defense investigator testified that he had discovered Warden Carroll's "information" years earlier, and that Cooper's attorneys had had that information for years and knew that it was worthless because, as everyone had known since trial, the shoes had not been purchased from Sears and were not readily available in retail stores. In other words, the whole appeal was based on a lie. It was based on worthless evidence that Cooper's lawyers held back until the last minute, so that they trick the en banc Ninth Circuit into grant a second-appeal application that it never should have been considering in the first place.

The decision of the en banc majority also shows a lack of understanding of the evidence against Cooper in other ways as well. The hastily crafted opinion noted: "[t]here was, of course, evidence pointing to Cooper's guilt at trial." The opinion then references a spot of blood on the hallway wall of the Ryen house, **the bloody T-shirt**, and hand-rolled cigarettes from the Ryen car." But the so-called bloody T-shirt was **never** used as evidence against Cooper at trial. Instead, it was Cooper's defense attorney who had waived it around and argued that it belonged to the "real killer" as he tried unsuccessfully to cast suspicion on three unknown patrons who visited a local bar on the night of the murders. Remarkably, the en banc panel that decided to grant Cooper more appeals thought the T-shirt was used as evidence against him at trial. Hours before Cooper's execution, the Ninth Circuit en banc panel majority wanted a "quick and definitive scientific" test conducted to determine whether Cooper's blood was planted on

evidence that was **never used against him at trial**. This error was magnified when the test turned out to be neither quick, definitive, or even scientific – or helpful to the defense.

The other scientific test that the en banc Ninth Circuit panel ordered for Cooper was mitochondrial DNA testing of hair that Jessica supposedly was "clutching" in her hand at the time she died. Cooper argued it could identify the real killer. It came as no surprise, after spending $2,500 per hair, that the victims could not be eliminated as the donors of the hairs selected by Cooper's own expert. Common sense suggests that when a person is attacked with a hatchet and multiple blows are struck to the head, clumps of cut hair will adhere to the victims' bloodied hands. Cooper's expert from trial and post-conviction testing himself explained that the theory that young Jessica clutched her killer's hair in her hands was absurd because a dead person cannot clutch anything. Also, how would a little girl, attacked in the dark by a hatchet-wielding assailant, ever manage to pluck hairs from her assailant's head? The whole argument that Jessica was "clutching" her killer's hair is absurd. The only thing that it accomplishes is to force her family and my family to once again focus on the horrific manner in which the Ryens and my son died.

The Streamlined Procedures Act also would have changed the course of Cooper's case by limiting the amendments that he filed to his first federal habeas petition. Cooper first asked the federal court for a stay of execution in March of 1992. In August of 1994, he finally filed his first habeas petition. He was allowed to amend his petition in April of 1996. Then Cooper was again allowed to amend his petition in June of 1997. The Streamlined Procedures Act would allow one amendment as a matter of right before the answer is filed, and any amendment after that would have to present meaningful evidence that the petitioner did not commit the crime.

Obviously, under these standards, Cooper would not have been allowed to amend his petition twice over a three year period. Years of delay could have been avoided.

The Streamlined Procedures Act also would not have permitted Cooper's appeal from the denial of his first federal habeas petition to take as long as it did. Cooper's appeal of the 1997 denial of his first federal habeas petition was not completed until 2001 – over three and a half years. The SPA would have required that the matter be resolved within 300 days of the completion of briefing by the parties, and would require a rehearing decision to be made within 90 days, a rehearing by a three-judge panel to be completed within 120 days, and a rehearing en banc to be completed within 180 days. Years of delay in Cooper' appeal in the federal court could have been avoided.

Every state and federal court has repeatedly and consistently upheld the judgment against Kevin Cooper, yet 22 years later he still has not answered for his horrific crimes. My husband and I urge you to reform the federal habeas system so the profound abuses and manipulations that have allowed the murderer of our son to evade justice for over 22 years will finally be brought to an end.

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July 12, 2005

VIA FACSIMILE

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, DC 20510-3802

Dear Senator Specter:

History has shown that Congressional deliberation and debate can improve legislative proposals. Complicated habeas corpus legislation deserves at least the same kind of careful treatment as other proposals that come before the Senate Judiciary Committee. Therefore, we write to urge the Judiciary Committee not to hastily report out the recently proposed habeas corpus amendments.

We are litigators, having practiced in state and federal courts across the country, in major, complex civil litigation, for almost 30 years. We and others in our Firm also represent convicted prisoners in federal habeas corpus actions, many on death row, on a pro bono basis. We undertake these representations, which invariably are time-consuming, because of our concern that over-burdened and understaffed public defenders often do not have the time and resources to effectively represent their clients. All too often, poor defendants often fail to receive the due process guaranteed all citizens charged with serious crimes. Consequently, we take these representations free of charge, hoping and expecting that we can make a difference not just for our client, but for the administration of justice.

The only hope for many defendants for correcting miscarriages of justice is the writ of habeas corpus. One death row inmate we represent was precluded in state court from raising claims regarding the prosecution's suppression of evidence. In federal court, our client was granted discovery and an evidentiary hearing and established that the prosecution had suppressed evidence relating to its star witness. But for meaningful federal habeas corpus review, our client would never have had the opportunity to prove his claim.

The amendments to the habeas statute in the 1980's and 1990's have already significantly curtailed access to the federal courts for habeas petitioners. Further curtailment would be unwarranted and unwise. The federal courts must guard the rights of all people, and the Congress should do all within its power to make sure that the federal courts continue to have that duty and power. The proposed amendments are manifestly inconsistent with these principles. We urge your Committee to reject the proposed amendments or, at a minimum, hold hearings to address the continued necessity of federal habeas jurisdiction.

We would be pleased to answer any questions you or the Committee may have.

Respectfully yours,

Andrew E. Kantra
Andrew R. Rogoff

AEK/ARR/jls

cc: Hon. Patrick J. Leahy (via facsimile)

latimes.com

http://www.latimes.com/news/opinion/editorials/la-ed-death13jul13,0,2722945.story?coll=la-news-comment-editorials

EDITORIAL

Streamline or steamroll?

July 13, 2005

THERE IS A GROWING awareness in this country, given a growing number of exonerations based on DNA and other evidence, that it's too easy for innocent people to land on death row. These cases help explain why public support for the death penalty has been eroding.

The U.S. Supreme Court is increasingly alarmed by the quality of legal representation afforded defendants in capital cases, and some states are hesitant to apply the death penalty given mounting doubts about the level of error built into their judicial systems. So it's the opposite of logic to see some in Congress moving the other way, seeking to curtail the ability of federal courts to hear claims of an improper trial from defendants convicted in state court.

The Senate today holds a hearing on the ill-advised and Orwellian-sounding Streamlined Procedures Act. What this legislation and its House companion threaten to streamline is the execution or lifetime incarceration of the innocent. The federal judiciary is the ultimate guarantor of Americans' constitutional rights, including the right to due process, and it's sad to see members of Congress (including California's former attorney general, GOP Rep. Dan Lungren) eager to further limit federal oversight over flawed state proceedings.

The centerpiece of the legislation would eliminate the review of most claims for cases coming out of states that the U.S. Department of Justice has certified as providing defendants with competent counsel. Should we leave it up to Atty. Gen. Alberto R. Gonzales, he of the torture memos, to pass judgment on the quality of representation given convicts in Texas? Sounds like a great idea if you are a state prosecutor annoyed at those pesky federal judges.

The measure may even be unconstitutional — it's for a federal court, not a federal prosecutor, to determine whether states are violating the U.S. Constitution.

To sell their "streamlining" law, its proponents are offering to leave the door to the federal courthouse ajar for defendants who can point to evidence of their actual innocence. This is a cynical ploy. It's pretty hard to produce such evidence if your right to a competent lawyer has been denied, or if a prosecutor got someone to lie on the witness stand.

Exonerations of people wrongly convicted of a crime typically start with a finding that there was a procedural flaw in the case, and only subsequent fair hearings establish the truth. That's one reason Congress ought to stand up for the due process rights of all Americans.

July 20, 2005

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Patrick J. Leahy
Ranking Minority Member
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable James Sensenbrenner, Jr.
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Minority Member
House Judiciary Committee
B-351C Rayburn House Office Building
Washington, D.C. 20515

Re: The Streamlined Procedures Act (S. 1088 & H.R. 3035)

Dear Senators and Representatives:

The undersigned individuals are former prosecutors, law enforcement officers, and Justice Department officials who have served at the state and federal levels. Some of us support capital punishment and some of us oppose it. While we applaud efforts to improve the functioning of our courts and to assist crime victims and their families, we strongly oppose the proposed Streamlined Procedures Act. We believe the bill would eviscerate federal habeas corpus review of state convictions, lead to protracted litigation and delays, and prevent the federal courts from correcting wrongful convictions in cases of actual innocence.

The Streamlined Procedures Act is counterproductive to our goals of ensuring public safety and fairness, achieved when the guilty are convicted and the innocent acquitted. The bill's jurisdiction-stripping provisions turn a blind eye to the recurrent problems – such as incompetent or nonexistent counsel – that often thwart full consideration and correct determination of claims in state post-conviction proceedings. The bill's purported exception for prisoners who are actually innocent – which requires clear and convincing evidence of innocence and facts that could not have been discovered previously through the exercise of due diligence – creates a hurdle that few innocent prisoners will be able to overcome. As such, the bill will result in the wrongful incarceration or execution of innocent persons.

Expediting the federal post-conviction process at any cost – especially at the cost of wrongfully convicting or executing innocent people while the guilty parties remain free to commit more crimes – is, we believe, something that the American people will not countenance. Nor should they.

But the Streamlined Procedures Act does not expedite the process. In reality, it will engender years of litigation to resolve its inconsistencies with the Anti-Terrorism and Effective Death Penalty Act (AEDPA), enacted fewer than ten years ago in response to the same concerns expressed by the sponsors of this bill. The AEDPA includes strict, detailed procedures for

screening federal habeas corpus petitions, including a one-year statute of limitations. After years of litigation, the federal courts have resolved most major interpretive issues raised by the law. The proposed legislation is also inconsistent with the Justice For All Act, which became law less than a year ago.

The AEDPA took care of whatever problems there were with systemic delays. Statistics maintained by the Administrative Office of the United States Courts indicate that the number of federal habeas petitions has declined significantly over the past five years and habeas cases are resolved more quickly than other civil proceedings (most often on procedural grounds pursuant to the AEDPA). There is no reason to throw the system into disarray with another dramatic and potentially unconstitutional reworking of federal law.

We have spent part of our careers seeking justice for crime victims, and we know from firsthand experience the issues that victims face in the judicial system and the impact that their experience has on their lives. However, we do not think the anecdotal evidence about delay cited by the bill's proponents justifies these extreme measures, and we fear that the bill will have exactly the opposite effect of what the proponents intend. It will cause significant delays in the processing of these cases, to the detriment of the legitimate concerns of crime victims.

It is important to consider the interests of victims and their families in the judicial process, but we believe the Streamlined Procedures Act would do a disservice to those persons and would eviscerate the means by which federal courts ensure that innocent persons are not mistakenly convicted of crimes they did not commit. Certainly, Congress should not rush to judgment on this bill, and any changes to current procedures should be undertaken only after significant study, deliberation, and input from experts and interested persons and groups. Thank you for considering our views on this extremely important matter.

Sincerely,

Elizabeth K. Ainslie
Assistant U.S. Attorney, Eastern District of Pennsylvania (1979-1984)

Harold J. Bender
U.S. Attorney, Western District of North Carolina (1977-1982)

G. Brian Brophy
Former District Attorney, Dane County, WI

James J. Brosnahan
Former Assistant U.S. Attorney, Arizona and California

A. Bates Butler III
U.S. Attorney, District of Arizona (1980-81)
First Assistant U.S. Attorney (1977-80)
Deputy Pima County (Arizona) Attorney (1970-77)

W.J. Michael Cody
Attorney General, Tennessee (1984-1988)
U.S. Attorney, Western District of Tennessee (1977-1981)
Chair of the Southern Conference of Attorneys General (1987-1988)

Patrick J. Cotter
Special Attorney, Strike Force on Organized Crime, E.D.N.Y. (1987-1990)
Assistant U.S. Attorney, Eastern District of New York (1992-1998)

Thomas Anthony Durkin
Assistant U.S. Attorney, Northern District of Illinois (1978-1984)

Thomas J. Farrell
Assistant U.S. Attorney, Western District of Pennsylvania (1995-2000)

Gil Garcetti
District Attorney, Los Angeles County, CA (1992-2000)

Mark Godsey
Assistant U.S. Attorney, Southern District of New York (1996-2001)

Lawrence S. Goldman
Assistant District Attorney, New York County, NY (1966-1971)

Raymond R. Granger
Assistant U.S. Attorney, Eastern District of New York (1992-1998)

Saul A. Green
U.S. Attorney, Eastern District of Michigan (1994-2001)

Bruce C. Houdek
Assistant U.S. Attorney, Western District of Missouri (1963-1968)

Kerry A. Lawrence
Assistant U.S. Attorney, Southern District of New York (1988-1999)

William J. Martin
Assistant State's Attorney, Cook County, Illinois (1962-1968)

Thomas K. McQueen
Assistant U.S. Attorney, Northern District of Illinois (1974-1979)

Stephen J. Meyer
Assistant District Attorney, WI (1979-1980)

A. John Pappalardo
U.S. Attorney, District of Massachusetts (1992-1993)

Katrina Pflaumer
U.S. Attorney, Western District of Washington (1993-2001)

Ira Reiner
District Attorney, Los Angeles County, CA (1984-1992)

Stephen H. Sachs
Attorney General of Maryland (1979-1987)
U.S. Attorney, Maryland (1967-1970)
Assistant U.S. Attorney, Maryland (1961-1964)

Bill H. Seki
Deputy District Attorney, Los Angeles, CA (1988-1997)

Alan Silber
Assistant Prosecutor & Chief, Economic Crimes Unit, Essex County, NJ (1968-1973)

David Alan Sklansky
Assistant U.S. Attorney, Central District of California (1987-1994)

Neal R. Sonnett
Assistant U.S. Attorney & Chief, Criminal Division, Southern District of Florida (1967-1972)

Ann C. Tighe
Former Assistant U.S. Attorney, Northern District of Illinois

Tony West
Former Assistant U.S. Attorney, Northern District of California

Ronald G. Woods
U.S. Attorney, Southern District of Texas (1990-1993)
Assistant U. S. Attorney (1976-1985)
Assistant District Attorney, Harris County, Texas (1969-1976)
Special Agent and Legal Advisor, FBI (1965-1968)

David Zlotnick
Assistant U.S. Attorney, Washington, DC (1989-1993)

Statement Of Senator Patrick Leahy,
Ranking Member, Committee On The Judiciary
Hearing On Habeas Corpus Proceedings and Issues of Actual Innocence
July 13, 2005

It has been less than a decade since Congress overhauled federal habeas corpus law as part of the Antiterrorism and Effective Death Penalty Act of 1996, or AEDPA. Enacted as a bipartisan compromise, this law severely narrowed the scope of habeas jurisdiction by, for example, imposing strict new time limits and procedural bar rules.

I thought then, and continue to think, that AEDPA went too far. By drastically curtailing the ability of federal courts to adjudicate meritorious constitutional claims, it increased the risk that people who were wrongfully convicted would be left to rot in jail, and that the nightmare scenario -- the execution of an innocent American – would come to pass.

Of course, others thought AEDPA did not go far enough. That is the nature of compromise. During the floor debate on AEDPA, the Senator from Arizona offered an amendment to eliminate federal habeas except in circumstances where the state's justice system had proved incapable of enforcing federal constitutional rights. That extreme position was roundly rejected in the Senate, with every Democratic Senator and more than a dozen Republican Senators -- including several Republican members of this Committee -- voting against it.

The habeas bill that is now before the Committee, the so-called "Streamlined Procedures Act," would go much farther than AEDPA did, and it would unravel that bipartisan compromise. I will have more to say about the specifics of the bill when the Committee marks it up, but for now it will suffice to say that I can see little practical difference between this bill and the 1996 amendment that was defeated.

What has changed that might justify unraveling AEDPA now? I imagine that we will hear today anecdotal evidence about cases in which habeas proceedings have dragged on long after conviction. I would urge consideration first and caution against any rash judgments. We need to ask some questions before we rush to legislate based on such stories.

First and foremost, what caused the delays? Was federal habeas being abused? Or was it that most of the time between conviction and the end of habeas proceedings was taken up by either state habeas proceedings, or by delays attributable to the state itself? My understanding is that it is quite common in some states for a case to spend many years in state post-conviction proceedings. If that is right, there may well be something to be said for taking a close look at the rules that require state prisoners to exhaust state post-conviction remedies before they can bring a federal habeas petition. But there is nothing to be said for scape-goating the federal courts for a problem that is internal to certain state justice systems.

- **Dennis Fritz** spent 12 years serving a life sentence until he was finally able to prove his innocence through DNA testing. He testified before this Committee five years ago, in support of the Innocence Protection Act, and I welcome him back.

- **Darryl Hunt** of North Carolina was convicted in 1984 for a murder he did not commit. He was freed in 2003, after DNA evidence ruled him out as the killer and identified the true perpetrator of the crime. The true perpetrator then confessed.

- **Brandon Moon** was convicted of rape in 1987, while a student at the University of Texas at El Paso. DNA testing cleared him of the crime just a few months ago, and he was released with the apology of the District Attorney.

Three other exonerees are also in the audience – **Thomas Goldstein, Gloria Killian, and Joseph Eastridge.** Each was granted federal habeas relief after presenting substantial evidence of actual innocence. If S.1088 were the law, they would still be wrongfully imprisoned, or worse. So there will be no misunderstanding of what is at stake here, let me repeat that: If S.1088 were the law, exonerees such as these would still be wrongfully imprisoned, or worse.

That is what we have learned since AEDPA, and that lesson has involved saving innocent lives. And that is what apparently convinced President Reagan's first appointee to the Supreme Court -- and one of the strongest advocates of states' rights in the history of the Court -- that left without federal scrutiny, state criminal justice systems may pose unacceptable risks. In July 2001, Justice Sandra Day O'Connor acknowledged in a widely reported speech that "serious questions are being raised" about the administration of the death penalty. Her conclusion was chilling in its commonsense candor: "the system may well be allowing some innocent defendants to be executed." Tragically, we now know how prophetic those words appear to be.

Just this week, prosecutors in St. Louis, Missouri, reopened a murder investigation – 10 years after a man was executed for the crime. Larry Griffin was put to death on June 21, 1995, for a drive-by killing that he steadfastly maintained he did not commit. Now, new evidence has emerged to support his claim, and the victim's family is expressing concern that the wrong man was convicted and executed.

I sympathize deeply with victims and their families who seek closure. I hope they will take some comfort from the statistics showing that notwithstanding some scare-mongering rhetoric to the contrary, under AEDPA, habeas relief has effectively been reserved for a very small minority of truly problematic cases. But I will not vote to increase the risk that more innocent people will be executed.

The bill before us would greatly increase that risk, as well as the risk of lesser, but nonetheless life-shattering, injustices. And it would do so without any real evidence that the new regime we enacted less than a decade ago to limit federal habeas is not doing the job. AEDPA is not broken – at least, not in the way this bill would presuppose – and there is no need to "fix" federal habeas corpus by destroying it.

Hon. Timothy K. Lewis
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July 12, 2005

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Patrick J. Leahy
Ranking Minority Member
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Senators Specter and Leahy:

We are former judges who write to convey our grave concerns about S. 1088, which purports to "streamline" the federal habeas corpus system, but which would in reality dramatically diminish, if not entirely eliminate, the federal courts' ability to consider habeas corpus petitions. Our concerns arise because this bill would prevent the federal courts from granting many petitions, even in cases of actual innocence. It would also create significant inconsistencies with current statutes and longstanding judicial decisions, thus slowing the litigation process to the detriment of crime victims and others who legitimately wish the process to proceed expeditiously.

Ordinarily, we are reluctant to take a public position on pending bills. However, judges have a duty to speak out about legislation that affects the administration of justice. Active judges may hesitate to respond, so we feel a responsibility to take the unusual step of making our position known.

S. 1088, and its companion House bill, H.R. 3035, would largely eliminate federal courts' power to adjudicate critical federal issues in many habeas corpus cases involving state prisoners. It appears that the sponsors are chiefly concerned that habeas corpus petitions filed by prisoners under sentence of death may move too slowly through the system. In our experience, delay is not a serious problem in death penalty cases. If it ever was, the Anti-Terrorism and Effective Death Penalty Act, a comprehensive reform of habeas corpus enacted fewer than ten years ago, eliminated the problem. Most circuit courts routinely place capital cases on an expedited schedule. If there are instances in which death penalty cases have required years to resolve, they are exceptions to the rule and there are legitimate and important reasons for that delay.

Importantly, whatever the concerns of the sponsors of the bill about capital cases, its impact is far more sweeping. The bill covers not only capital cases, but every state criminal conviction,

capital and non-capital. Thus, it covers cases involving business, firearms, environmental, narcotics, and a vast array of other state offenses.

The bill professes to include an exception so that innocent people may still obtain relief. As we read it, however, the language of the exception is so narrow that it will cover virtually no one. There are now too many instances to ignore in which innocent people were sentenced to prison or even to death, and it took years for the evidence of their innocence to come to light. The limits on federal court review that S. 1088 proposes dramatically increase the risk that innocent people will languish in prison or even on death row, and that the true perpetrators of these crimes will remain free, perhaps to commit more crimes.

As we noted, the bill's effect would not be to streamline the process. Rather, it would delay it as courts will be forced to resolve inconsistencies between its language and the language in AEDPA and the Innocence Protection Act, the latter of which was enacted less than a year ago. It took almost 10 years for the courts to resolve questions about and challenges to AEDPA, and the constitutional questions and legal inconsistencies raised by S. 1088 are, in our view, much more serious and complicated. In addition, as we read the bill, it would overturn several recent Supreme Court decisions interpreting AEDPA as well as several other decisions of the Rehnquist Court, many of which have helped to further streamline the system and eliminate delays. It serves no one's interest to engender the kind of delays that this bill will create.

Moreover, this bill presents an extraordinary risk to the independence of the federal courts and to the separation of powers that underlies our democracy. Several provisions would flatly repeal federal court jurisdiction to entertain federal questions that are pertinent to the proper disposition of cases. These provisions are not modest adjustments to habeas procedure; they would foreclose federal judicial power to adjudicate federal question cases in the ordinary course. This would be a radical action, inconsistent with the long history of our American legal system.

Finally, we are constrained to say that this bill reflects distrust and, we think, disrespect for the federal judiciary. We frankly resent the implication that federal judges are not performing their constitutional functions in a proper and efficient manner. The truth is otherwise. Federal courts faithfully fulfill their responsibilities to the law and, as an independent branch of government, must be free to continue to do so.

It is difficult to see how legislation of this kind could improve the process and much easier to anticipate that it would complicate matters all the more. At the very least, Congress should not rush to judgment on this bill. There have been no studies on the impact of AEDPA on delays, and so the need for new legislation to decrease delays is significantly in doubt. We strongly support a study by the Judicial Conference of the United States or other independent body to determine whether there is any need for legislation to achieve the professed goals of S. 1088.

All of us have devoted our careers to ensuring that our country's laws are upheld. We strongly believe that this bill is misguided and dangerous and that it should not receive favorable action. We would be happy to convey our views in person to you and your colleagues.

Very truly yours,

Hon. Timothy K. Lewis	Former Judge, United States Court of Appeals for the 3rd Circuit Former Judge, United States District Court for the Western District of Pennsylvania Former Federal Prosecutor
Hon. William H. Webster	Former Director, Federal Bureau of Investigation Former Director, Central Intelligence Agency Former Judge, United States Court of Appeals for the 8th Circuit Former Judge, United District Court for the Eastern District of Missouri Former United States Attorney for the Eastern District of Missouri
Hon. William S. Sessions	Former Director, Federal Bureau of Investigation Former Chief United States District Judge for the Western District of Texas (1974-1987, Chief from 1980–1987)
Hon. Patricia Wald	Judge, United States Court of Appeals for D.C. Circuit (1977-1999) Chief Judge (1986–1991) Former Judge, International Criminal Tribunal for the Former Yugoslavia (1999-2001)
Hon. Robert J. Cindrich	Former United States Attorney for the Western District of Pennsylvania Former United States District Court Judge Western District of Pennsylvania
Hon. Stephen M. Orlofsky	Former United States Magistrate Judge for the District of New Jersey (1976-1980) Former United States District Judge for the District of New Jersey (1996-2003)
Hon. Bret H. Huggins	Former Judge, Arizona Superior Court (Navajo County, Arizona) (October 1992 to January 1997)
Hon. Charles Baird	Retired Justice, 5th District Court of Appeals, Dallas, Texas
Hon. Ron Chapman	Retired Justice, 5th District Court of Appeals, Dallas, Texas
Hon. Michael B. Bolan	Retired Judge of the Circuit Court of Cook County, Illinois Former Assistant States Attorney, Cook County, Illinois

	Former Assistant Attorney General, Illinois
Hon. Stanley G. Feldman	Retired Justice of the Arizona Supreme Court (1982-2002) Retired Chief Justice of the Arizona Supreme Court (1992-1996)
Hon. Sheila Murphy	Retired Presiding Judge of the 6th District Court, Cook County, Illinois

(List as of July 13, 2005)

Prentice H. Marshall, Jr.
43 Yorkshire Woods Road
Oak Brook, Illinois 60523

July 12, 2005

Via Facsimile (202) 228-1229

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Re: Streamlined Procedures Act of 2005

Dear Senator Specter:

I write to express my concern about the precipitous action the Senate Judiciary Committee, and possibly the Senate itself, may take by reporting out the recently proposed habeas corpus amendments. I am a partner at the law firm of Sidley Austin Brown & Wood LLP, having practiced in state and federal courts across the country, primarily representing chemical and pharmaceutical companies in major, complex civil litigation, for almost 30 years. I have also represented convicted prisoners in federal habeas corpus actions, many on death row, on a part-time, pro bono basis, during most of my legal career. Most of my pro bono clients have been imprisoned in state courts after findings of guilt in state courts, often in Cook County, Illinois.

I undertake these representations, which can be very time consuming, because of my concern that over-burdened and understaffed public defenders often do not have the time and resources to effectively represent their clients in the (similarly) understaffed and overburdened state judicial systems, especially those found in large cities. While my observations have been that public defenders and judicial officers are, in the main, dedicated and honest public servants, I have also observed that, all too often, poor, young defendants often fail to receive the due process guaranteed all citizens charged with serious crimes. Consequently I take these representations, free of charge, hoping and expecting that I can make a difference not just for my client, but for the administration of justice for all persons.

My experiences over the years have, and continue, to bear out my concerns. Many defendants, especially those charged as young men and involving the most serious crimes, often do not get adequate representation or, consequently, a fair trial in state court. And the last bastion for correcting these miscarriages of justice is the federal habeas corpus court. I have personally represented two young men on Illinois's death row who unsuccessfully litigated for years in the state courts in their efforts to have their death sentences set aside based on

ineffective assistance of counsel. It was not until they were able to have their death sentences scrutinized in federal court that they received relief. Were it not for the availability of federal habeas corpus, these men would have been wrongfully executed, after trials that did not comport with due process. See *Emerson v. Gramley*, 91 F.3d 888 (7th Cir. 1996); *St.Pierre v. Walls*, 297 F.3d 617 (7th Cir. 2002).

As you undoubtedly know, the amendments to the habeas statute in the 80's and 90's have already significantly curtailed access to the federal courts for habeas petitioners. Further curtailment would be unwarranted and unwise. The federal courts have the duty to be guardians of the rights guaranteed all people, and the Congress should do all within its power to make sure that the federal courts continue to have that duty and power. The proposed amendments are manifestly inconsistent with these principles. I urge your committee to reject the proposed amendments or, at a minimum, hold hearings to address the continued necessity of federal habeas jurisdiction.

I would be pleased to answer any questions you or the committee may have.

Sincerely,

Prentice H. Marshall, Jr.

PHM/hc

cc: The Honorable Patrick J. Leahy (via facsimile: (202) 224-3479)

July 12, 2005

VIA FACSIMILE

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Terri L. Mascherin
Tel 312 923-2799
Fax 312 840-7799
tmascherin@jenner.com

Re: Proposed Streamlined Procedures Act

Dear Senator Specter:

I am a partner with the law firm of Jenner & Block, LLP in Chicago. I and others with my firm have represented clients in state appeals and in federal habeas corpus proceedings in Illinois and in other states. I became involved in that work under appointment by the Capital Litigation Division of the Office of the Appellate Defender of Illinois, which was seeking to alleviate the backlog of cases in its office by enlisting large private law firms like mine to represent prisoners, under contract with the Appellate Defender's office.

I am writing to express concern over the proposed Streamlined Procedures Act. In my experience, I have seen many instances in which the state courts of Illinois have not dealt effectively or carefully with issues in criminal appeals and post-conviction proceedings. Federal review by an Article III judge has, in those cases, provided the Constitutional backstop necessary to avoid serious miscarriages of justice.

For example, in recent years federal courts here in Chicago granted habeas relief to two Illinois prisoners, Roger Collins and William Bracey, who were sentenced to death after trials before a judge who was found to have taken bribes. The judge's corruption was uncovered as part of the Greylord investigation of the Cook County Circuit Court system. The state courts in that case failed to examine this issue, despite the evidence of the judge's corruption introduced in the Greylord prosecutions. The *Collins* and *Bracey* cases are but one example – albeit a striking one – of why it is essential to ensure independent federal court review to protect the constitutionally-guaranteed right to seek the remedy of habeas corpus.

I urge you to take all steps necessary to ensure that proper hearings are held on the proposed Streamlined Procedures Act, and that the proposed legislation is examined very carefully to

ensure that the restrictions on habeas relief imposed in that Act will not have the effect of curtailing the writ of habeas corpus so strictly as to negatively affect our system of justice.

Very truly yours,

Terri L. Mascherin

TLM:kat
cc: The Honorable Patrick J. Leahy

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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

July 13, 2005

Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Mr. Chairman:

As the Senate Judiciary Committee begins consideration of S. 1088, the "Streamlined Procedures Act of 2005," I wanted to provide you with the views of the Judicial Conference of the United States on this habeas corpus legislation. As explained more fully below, the Judicial Conference opposes particular provisions within sections 8, 9, and 11 of S. 1088, based on positions previously adopted by the Conference.

Because of the quick pace at which the bill is being considered, we thought it important to provide these views at this time. The judiciary is still assessing the bill and may provide additional comments in the near future. In this regard, I have asked the Judicial Conference Committee on Federal-State Jurisdiction, chaired by Judge Howard McKibben, U.S. District Court for the District of Nevada, in consultation with certain other committees of the Conference, to undertake an analysis of the proposed legislation to determine its implications for the federal courts and the administration of justice. We hope to continue to be of assistance to the Judiciary Committee in its consideration of S. 1088.

The judiciary's existing positions in this matter are based principally on its consideration of the 1989 Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Powell Committee Report), a report of the committee chaired by then-retired Justice Lewis F. Powell, Jr. The Powell Committee studied habeas procedure and

then proposed statutory reforms that sought to enhance the competency of counsel and expedite review in capital cases. The Conference approved those proposals in 1990 with two modifications.[1] *See Report of the Proceedings of the Judicial Conference of the United States* (*Proceedings*), March 1990, pp. 8-9. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which in part responded to the recommendations in the Powell Committee Report.[2]

The Conference has also drawn on other prior positions it has adopted in formulating the specific comments below.

Section 8

Section 8(a) of S. 1088 would amend 28 U.S.C. § 2254 to limit the time in which courts of appeals could hear and determine appeals from district court decisions regarding habeas corpus petitions. The bill would require appellate courts to decide a habeas appeal within 300 days after the appellee's brief is filed, rule on a petition for rehearing of an appellate court decision within 90 days, and decide cases on rehearing within 120 days if the appeal is before the same appellate panel or 180 days if the rehearing is before the court en banc.

The Judicial Conference is mindful of the concerns raised by the sponsors of the legislation as to the length of time it has taken to complete action on some habeas cases. The Conference, however, has consistently expressed its strong opposition to the statutory imposition of priority, expediting, and time limitation rules for designated categories of litigation, beyond those specified in 28 U.S.C. § 1657. The Conference has also specifically opposed provisions relating to judicial case management of habeas corpus actions in capital cases. *See, e.g., Proceedings*, September 1990, p. 80. Section 1657 already requires courts, both trial and appellate, to "expedite the consideration of any action brought under chapter 153 [of title 28, United States Code]," which includes habeas corpus proceedings. This expediting requirement is in addition to

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[1]One modification relevant to S. 1088 established standards for the appointment and compensation of counsel (*see infra* at page 3). The other modification related to a federal court's consideration of a second or successive petition.

[2]Chapter 154 of title 28 codified a special set of federal habeas corpus procedures to govern capital cases that would apply only to petitions brought by prisoners in states that have chosen to adopt specified procedures to ensure competent counsel in state post-conviction proceedings.

many other expediting mandates that are already placed on the federal courts, including the specific time deadlines for criminal cases under the Speedy Trial Act of 1974.

Specific time limits require that scarce judicial resources be diverted from other matters pending before the court, disrupting the orderly processing of cases. Inflexible time limits also fail to accommodate developments that warrant a delay in the interests of justice or efficient court administration, such as a stay pending a Supreme Court decision in a related or similar case or a remand to the state courts for the resolution of state-law questions. Because S. 1088 would impose specific deadlines on judicial actions, the Judicial Conference opposes Section 8(a).

Section 9(c) & (d)

Section 9 of S. 1088 would amend chapter 154 of title 28, United States Code (now codified in 28 U.S.C. §§ 2261-2266), which establishes special habeas corpus procedures in capital cases arising in states that have adopted specified procedures to ensure competent counsel in state post-conviction proceedings. Section 9(c) would authorize the Attorney General of the United States to determine that a state has "opted-in" to chapter 154 by certifying that the state has established by statute, by rule of its court of last resort, or by another agency authorized by state law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings. Section 9(d) provides that the decision of the Attorney General to certify a state for this purpose would be subject to judicial review exclusively in the U.S. Court of Appeals for the District of Columbia Circuit. The certification decision of the Attorney General would be conclusive "unless manifestly contrary to the law and an abuse of discretion," which is a very deferential standard of review.

The provisions included in 9(c) and (d) are inconsistent with Judicial Conference policy. In adopting the Powell Committee recommendations in 1990, the Conference made clear that it supports a role for the federal courts in determining whether a state has met the requirements for expediting capital habeas corpus proceedings. The Conference determined that there should be specific mandatory federal standards similar to those set forth in the Anti-Drug Abuse Act of 1988 (codified at 21 U.S.C. § 848(q)) for the appointment and compensation of counsel in capital cases. The Conference also stressed the need for counsel at "all stages of the state and federal capital punishment litigation." *Proceedings*, March 1990, p. 8.

A core concept behind the Conference's action was that the federal courts would assume a critical and continuing role in determining the adequacy of state mechanisms for providing counsel and whether the state has complied with the requirements of 28 U.S.C. § 2261(b) and (c). This is reflected in the following excerpt from the Powell Committee Report (at page 11):

> The final judgment as to the *adequacy* of any system for the appointment of counsel under subsection (b), however, rests ultimately with the federal judiciary. If prisoners under capital sentence in a particular State doubt that a State's mechanism for appointing counsel comports with subsection (b), the adequacy of the system – as opposed to the competency of particular counsel – can be settled through litigation.

Section 9(c) would shift the responsibility for determining whether a state has established a "qualifying mechanism" to the Attorney General, thereby divesting district and appellate courts of their current jurisdiction. The Conference recognizes that section 9(d) would provide for judicial review of the Attorney General's decision in the U.S. Court of Appeals for the District of Columbia Circuit. However, the Conference has traditionally opposed consolidating review of certain categories of cases in a single Article III court, preferring instead to disperse actions to the geographic Article III courts to preserve their generalist nature. *See, e.g., Proceedings*, September 1982, pp. 64-65. Moreover, some district and appellate courts already have experience with the issues relevant to certification decisions.

Section 11

The federal courts are responsible for administering the appointment of counsel in federal criminal and related proceedings, including capital habeas corpus cases. 18 U.S.C. § 3006A (Criminal Justice Act); 21 U.S.C. § 848(q) (Anti-Drug Abuse Act). The appointment of counsel in both federal capital prosecutions and federal capital habeas corpus proceedings involving either federal or state prisoners is specifically addressed in § 848(q). Judicial Conference policy in this area is set forth in the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume 7, *Guide to Judiciary Policies and Procedures* (Guidelines).

Section 11 of S. 1088 would substantially amend the language in 21 U.S.C. § 848(q)(9) that provides for an *ex parte* application for expert or other services as long as "a proper showing is made concerning the need for confidentiality." The proposed

amendment would permit an *ex parte* proceeding in habeas corpus cases only if necessary to protect any confidential-communications privilege between the petitioner and post-conviction counsel. Further, the bill would require that the government's attorney be notified of any application to proceed *ex parte* and given an opportunity "to answer the application." Finally, it would require immediate public disclosure of any amounts paid for expert and other services.

The current statutory scheme and Judicial Conference policy strike an appropriate balance between protecting the public fisc and preserving the due process protections constitutionally guaranteed in our adversary system. Guidelines Paragraph 3.03 explains that *ex parte* proceedings preserve the adversarial principle in non-capital criminal cases: "[m]aintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense." Although 21 U.S.C. § 848(q)(9) was amended by the AEDPA to limit the use of *ex parte* proceedings in capital cases, the statute and regulations (Guidelines, Paragraph 6.03) have preserved a core principle of the adversarial system by permitting *ex parte* consideration upon a showing of need for confidentiality. Giving prosecutors the right to intervene in this administrative process would alter the balance of the adversarial system and introduce complexity and delay. Moreover, it would create a disparity in the rights afforded defendants based on financial status: petitioners with enough money to hire their own experts would have the unfettered right to do so, while those who do not would, in most circumstances, have to reveal to the prosecution confidential strategy decisions, investigative avenues, and work product in order to obtain services necessary to a constitutionally adequate defense.

Section 11 also would add to 21 U.S.C. § 848(q)(9) a requirement that any amounts authorized to be paid for expert and other services be disclosed to the public immediately. Section 848(q) generally, and section 848(q)(9) in particular, apply equally to federal capital prosecutions and federal capital habeas corpus cases. As drafted, the immediate disclosure mandate proposed in section 11, unlike the other proposed changes to section 848(q)(9), would apply to both federal capital prosecutions and federal capital habeas corpus cases involving federal and state prisoners. The same interests that require confidentiality in the funding application process also support the present statutory language and Judicial Conference policies, which provide for disclosure of payments made in capital habeas cases "after the disposition of the petition." *Id.* § 848(q)(10)(C). The Guidelines cite this language in subparagraph 5.01B and state that the timing of

disclosure should be consistent with the principles stated in subparagraph 5.01A, which provides in part:

> Generally, such information which is not otherwise routinely available to the public should be made available unless it is judicially placed under seal, or could reasonably be expected to unduly intrude upon the privacy of attorneys or defendants; compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship or privileged information provided by the defendant or other sources; or otherwise adversely affect the defendant's right to the effective assistance of counsel, a fair trial, or an impartial adjudication. (See 5 U.S.C. § 552(b).)
>
> Upon request, or upon the court's own motion, documents pertaining to activities under the CJA and related statutes maintained in the clerk's open files, which are generally available to the public, may be judicially placed under seal or otherwise safeguarded until after all judicial proceedings, including appeals, in the case are completed and for such time thereafter as the court deems appropriate. Interested parties should be notified of any modification of such order.

Guidelines Paragraph 5.01A. Thus, the existing policies favor disclosure of expenditures for the costs of representation while appropriately committing to the discretion of the court the determination as to whether a delay in the release of such information is warranted in a particular case.

For these reasons, the Judicial Conference opposes the provisions in section 11 that would (1) limit *ex parte* applications for expert services, (2) give prosecutors the right to intervene in the funding application process, and (3) require immediate public disclosure of payment information.

Other sections

As mentioned previously, S. 1088 contains several provisions that the Judicial Conference has not yet had the opportunity to study fully. Given the importance of these issues, the judiciary would like to examine them more closely. For example, the bill proposes new standards applicable to all habeas corpus proceedings, both non-capital and capital. Three sections of the bill would address the ability of federal courts to

review habeas petitions brought by state prisoners: section 2 relates to mixed petitions (exhausted and unexhausted claims), section 4 relates to procedurally defaulted claims, and section 6 relates to federal review of claims where the state finds there was harmless error in sentencing. Section 10 would limit federal court review of state clemency and pardon procedures. Other sections would bar the courts of appeals from rehearing successive petitions *sua sponte* (section 8), prohibit the federal courts from extending the one-year period for filing a habeas petition on equitable grounds (section 5), and require federal judges hearing a habeas petition to transfer requests for investigative services to another judge (section 11).

In addition, a potential concern for the Conference is related to section 9(a). That subsection would replace existing section 2264 (establishing the scope of federal district court review) with a new version that would permit a federal court to review a state habeas petition in very limited circumstances. Under current law, for capital cases qualifying for the special procedures under chapter 154, a federal court is required to consider claims that have been raised and decided on the merits in state court and to apply to those claims the same standards that govern habeas cases generally under section 2254. If the petitioner raises a new claim not previously heard by state courts, section 2264 imposes restrictions on the availability of review.

Section 9(a) would bar federal jurisdiction unless the petitioner shows that the claim relies on a new rule of constitutional law that the Supreme Court has made retroactively available to cases on post-conviction review, or that the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. This restriction of habeas review may be contrary to the standard of review endorsed by the Conference when it adopted the recommendations of the Powell Committee. Implicit in that standard of review, although limited, was the notion that the federal courts would retain a role in safeguarding the constitutional rights available to defendants in these cases.[3]

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[3]In September 1991, the Conference opposed legislation containing language that would preclude habeas review by the federal courts in all cases in which there was "full and fair adjudication" at the state level. *See Proceedings*, September 1991, p. 59.

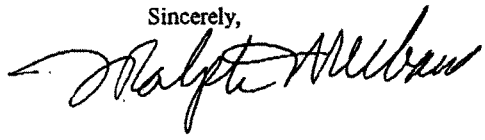
During the past decade, a body of case law has been carefully developed to implement the objectives of the AEDPA to streamline the procedures for federal habeas review. The proposed legislation may complicate the task of resolving many federal habeas cases by creating additional procedural issues that will undoubtedly be litigated in the federal courts. Such a development might lead to more, rather than less, litigation. The Conference believes that it is important to provide some continuity in the interpretation of current law and notes that the legislation would unsettle several carefully crafted Supreme Court decisions, including *Wainwright v. Sykes*, 433 U.S. 72 (1977) (per Rehnquist, J.) (tightening the standard for the review of procedurally defaulted claims), and *Rhines v. Weber*, 125 S.Ct. 1528 (2005) (per O'Connor, J.) (integrating the AEDPA time limits into the treatment of mixed petitions).

Conclusion

At this point, the Judicial Conference would like to communicate its opposition to provisions in sections 8, 9, and 11, based on existing positions. As its review of the legislation continues, the federal judiciary will likely consider whether the legislation would afford defendants a meaningful opportunity to adjudicate their constitutional rights in the state and federal courts, and at the same time provide for expeditious consideration and disposition of the issues presented in their habeas petitions.

Thank you for your consideration of these views, which we may supplement in the near future. We would be pleased to offer any assistance you deem appropriate as you consider this important issue. Please feel free to contact me at 202-273-3000, or, if you prefer, you may have your staff contact Karen Kremer, Counsel in the Office of Legislative Affairs, at 202-502-1700.

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable Patrick J. Leahy, Ranking Democrat, Committee on the Judiciary
Honorable Jon Kyl
Members of the Committee on the Judiciary

July 13, 2005

Hon. Arlen Specter
Chair, Senate Judiciary Committee
711 Hart Building
Washington, DC 20510

Re: The Streamlined Procedures Act of 2005 (S. 1088)

Dear Mr. Specter:

The NAACP Legal Defense and Educational Fund, Inc. (LDF) has been involved in the litigation of both capital and non-capital cases in both state and federal courts since our formation more than half a century ago. Our involvement began with pleas for help from family members of African-American men charged with or convicted of capital offenses, mostly in the Old South. Those cases often revealed shameful truths about the way the state criminal justice systems functioned – the insidious role that race played, the inability of poor people to find competent lawyers to mount a defense for them, the ease with which prosecutors could present false testimony against defendants, and the blatant disregard for the most basic constitutional guarantees of fairness and objectivity in prosecutions.

Our involvement with capital cases has continued to the present day because, despite major transformations in society, we still are confronted regularly with requests to help capital defendants whose convictions and sentences are the results of fundamentally unjust processes.

Whether those cases are now anomalies or stem from the persistence of more pervasive problems is irrelevant to the issue presented by the bill before this Committee: whether the doors of the federal courthouse should be effectively closed to those individuals who have been denied Constitutional protections intended to insure fair trials. Despite its innocuous sounding title, the "Streamlined Procedures Act of 2005" (S. 1088) would unquestionably block federal court review of seriously constitutionally deficient state court prosecutions, by eliminating federal court jurisdiction in many *habeas corpus* cases, and including in potentially all capital cases.

As the Committee well knows, federal *habeas corpus* is *the* mechanism by which the federal courts are able to insure that a conviction and sentence were not obtained in violation of the United

States constitution.[1] Nine years ago, after long study and debate, Congress undertook an extensive revision of federal *habeas corpus*, resulting in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Among other things, AEDPA shortened the amount of time within which a prisoner could file for habeas corpus review, limited the ability of a federal court to disregard a state court's finding that there was no reversible federal constitutional error in the case, eliminated the prisoner's ability to file multiple habeas corpus challenges to his conviction or sentence, and made appeals in the federal system more difficult to obtain. What S. 1088 seeks to do is to close the small window that AEDPA left open for prisoners to redress fundamental wrongs, even in death penalty cases.[2]

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[1] Of course, state courts also consider federal constitutional claims, both on direct review and in post-conviction proceedings. But, as numerous Supreme Court decisions have confirmed, there are instances in which state proceedings end without vindication of meritorious federal claims. In those circumstances, the U.S. Constitution guarantees federal court consideration of those claims through *habeas corpus*.

[2] AEDPA clearly has had an effect on the number and pendency of *habeas corpus* proceedings. Looking at executions in the post-*Furman* era, in the eight years since AEDPA, the average

yearly number of executions in this country has more than tripled.

In that same time period, state court review has remained inadequate. There are many reasons for the deficiencies in the state appellate process. In many states, state court judges are elected or subject to retention election. That adds a political calculation to any judicial decision. A political decision is not one based purely on the merits of the issue, but includes potential ramifications for the decision-maker. Moreover, many state post-conviction rules require that the case return to the judge who originally tried it. In order to grant relief, the judge must decide that

serious errors occurred on his watch, or even by his own actions or inactions.

Most states do not provide for the appointment of counsel for post-conviction review, and most of those that do limit the kinds of claims that can be raised, and provide such inadequate funding that an attorney must donate his time *and* pay money from his own pocket if the case is to be properly investigated and litigated. Few attorneys step forward to make such a sacrifice for prisoners convicted of notorious and heinous crimes.

Finally, most states do not have rules similar to those in federal court, which allow for the discovery of documents and evidence relating to the prosecution of the case.

It is particularly ironic that S. 1088 is being proposed just as public support for the death penalty, and confidence in our criminal justice system, is diminishing.[3] The public is becoming more aware of problems that were previously shielded from its view. The availability of DNA testing has not only freed the innocent, but shined a light on the many ways that things can go wrong in a criminal prosecution: eyewitnesses can wrongly identify the defendant as the perpetrator (particularly in cases of cross-racial identification); state forensic experts can be wrong when they testify that physical evidence proves the defendant's guilt; state investigators and laboratories can mishandle physical evidence or give erroneous testimony, sometimes deliberately; inmate witnesses can lie about what the defendant said while awaiting trial; police officers or prosecutors can withhold or destroy evidence of innocence or lesser culpability (critical in capital sentencing); people can be made to confess to crimes they didn't commit; and many, many people have lawyers who do little or nothing to discover the truth or present a defense. In many jurisdictions, prosecutors fight tooth and nail to prevent post-conviction DNA testing, because all sorts of other ugly truths are then uncovered. What S. 1088 will do is similar – by stripping the federal courts of jurisdiction to review state court convictions, flaws in state prosecutions will remain hidden.

We will not undertake a section-by-section analysis of the many ways that S. 1088 would prevent the federal courts from redressing constitutional violations in *habeas corpus*. We know that others will present that analysis to the Committee. We urge the members of the Committee to examine S. 1088's provisions and the purported justifications for them closely, and consider what little of federal habeas review will remain if those provisions become law.

A look at just the most recent of LDF's cases in the United States Supreme Court will illustrate some of the many injustices S. 1088 is designed to keep from federal court scrutiny and correction.

The Case of Delma Banks[4] – Delma Banks is an African-American man who was tried for capital murder in Bowie County, Texas in 1980. LDF was asked to become involved in the case at the post-conviction stage, because it appeared that prosecutors had intentionally prevented African Americans from serving on Mr. Banks's jury pursuant to a pattern and practice going back many years before his trial. Mr. Banks's trial attorney had been the district attorney until less than two years prior to his trial, and had failed to object when the prosecutors trying Mr. Banks's case struck the prospective African-American jurors. Despite the weakness of the entirely circumstantial case against Mr. Banks, his lawyer conducted virtually no investigation of evidence that might be presented to a jury to

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[3] *See* http://www.deathpenaltyinfo.org/article.php?scid=9&did=873 and http://www.deathpenaltyinfo.org/article.php?did=840&scid=64; http://www.deathpenaltyinfo.org/newsanddev.php?scid=23

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cast doubt on Mr. Banks's guilt or to convince them that a long prison sentence would be sufficient punishment, rather than the death penalty.

Mr. Banks ultimately won *habeas corpus* relief in the Supreme Court of the United States, but not because of jury discrimination or ineffective assistance of counsel. The jury claim was deemed "defaulted" by the lower federal courts under rules applicable both pre- and post-AEDPA that preclude federal *habeas corpus* relief when a state court denies relief on a claim because state procedures for litigating such errors were not followed. (Even if the default was the result of a failure of the defendant's lawyer, the defendant is barred from raising a claim as important and fundamental as jury discrimination under these circumstances.) Rather, Mr. Banks won habeas relief because, in the course of investigating his case, LDF uncovered multiple examples of serious, unconstitutional state misconduct in the case, including the following:

- A police-paid informant set up Mr. Banks's arrest, and was a key witness against Mr. Banks at trial – but at trial, the informant denied that he had any relationship to law enforcement officers, and the prosecutor vouched for his honesty in saying this, all the while knowing that the testimony was false;

- Although Mr. Banks had no prior record of violence, the state put pressure on state witnesses to falsely implicate Mr. Banks in other acts of violence in order to prove that he would be a danger in the future, as Texas law requires before imposition of the death penalty;

- Prosecutors fed the only witness who linked Mr. Banks to the crime, key information about the case (like the date of the murder), and repeatedly rehearsed his testimony to transform it from "incredible" (in their words) to credible; the prosecutors also allowed him to lie on the stand by testifying that prosecutors had not prepared him to testify;

- Despite the state's repeated assurances that the trial prosecutors had turned over all discovery to which Mr. Banks was entitled pursuant to Brady v.

Maryland[5] and governing Texas law, the State withheld material, exculpatory information from Mr. Banks for over two decades until the federal district court ordered its disclosure.[6]

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[5] 373 U.S. 83 (1963).

[6] Some of the evidence concerning the misconduct came to light during the state post-conviction proceedings (pursuant to an investigation the state refused to fund). The state was able to continue to hide other evidence during state post-conviction, in the absence of an order by the state courts to turn over all of the pertinent information in their files. Only when the federal courts became involved and ordered the prosecution to comply with defense discovery requests was the information that formed the basis of Mr. Banks's prosecutorial misconduct claims revealed.

Under S. 1088, it is at best questionable whether the federal courts – including the Supreme Court – would have had the jurisdiction to review Mr. Banks's case, let alone grant relief. Obviously if Texas were able to obtain certification from the Attorney General, that it had an adequate system for the appointment of counsel in post-conviction, under Section 9, review of this capital case would be precluded.[7] But even without the wholesale preclusion of jurisdiction under Section 9, there are aspects of the case that would have led to a denial of jurisdiction in the federal courts. For example, the state asserted that not all Mr. Banks's claims were fully exhausted in the state courts – including the claim that relied on evidence the state had suppressed up until the federal magistrate ordered discovery. Whether a claim has been exhausted is often unclear, and the question is often resolved after complex litigation. Under S. 1088, the consequence of losing an argument over exhaustion of any issue in the petition is that the entire petition, and all the petitioner's claims, are forever barred from litigation in the federal courts.

Under the procedures that applied to Mr. Banks's case, once he discovered documentary evidence during the federal habeas proceeding that the linchpin guilt-phase witness against him had been extensively coached, despite trial testimony and prosecutors' assurances to the contrary (in addition to other evidence that would have discredited the witness's testimony) he was able to litigate that issue in federal habeas. He was also able to litigate his claim that the central penalty phase witness against him had been paid to concoct evidence against Mr. Banks, again despite trial testimony and prosecutorial assurances to the contrary.

Under S. 1088, those claims would have forever been barred, because the guilt-phase claim was discovered more than a year after the petition had been filed. Section 3 of S. 1088 prevents amendment of federal petitions under these circumstances. (Even if Mr. Banks had been allowed to amend, the petition arguably would then have become a "mixed" petition containing exhausted and unexhausted claims, subject to dismissal with prejudice under S. 1088, Section 2.) The penalty phase claim would have been barred because the State deemed the claim procedurally defaulted because Mr. Banks's lawyer failed to present all aspects of the claim in state court.

The Supreme Court ruled that the state's unconstitutional suppression of the relevant evidence excused Mr. Banks's procedural default. However, under SPA Section 4, the federal courts would have been denied jurisdiction over this claim and it never would have been adjudicated on the merits.

The bottom line is that under the S. 1088, Mr. Banks's conviction and death sentence, which resulted from clearly unconstitutional state action, would be allowed to stand. The constitutional safeguards against prosecutorial misconduct and public

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confidence in the administration of justice would undoubtedly suffer.

Other examples of the draconian consequences of S. 1088 abound and will be presented to the Committee. *Habeas corpus* relief is, under both AEDPA and Supreme Court precedent, substantially restricted from what it once was. LDF urges the Committee to preserve what little remains, and reject S. 1088.

Respectfully submitted,

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NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

July 13, 2005

Hon. Arlen Specter
Chair, Senate Judiciary Committee
711 Hart Building
Washington, DC 20510

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any issue in the petition is that the entire petition, and all the petitioner's claims, are forever barred from litigation in the federal courts.

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Under S. 1088, those claims would have forever been barred, because the guilt-phase claim was discovered more than a year after the petition had been filed. Section 3 of S. 1088 prevents amendment of federal petitions under these circumstances. (Even if Mr. Banks had been allowed to amend, the petition arguably would then have become a "mixed" petition containing exhausted and unexhausted claims, subject to dismissal with prejudice under S. 1088, Section 2.) The penalty phase claim would have been barred because the State deemed the claim procedurally defaulted because Mr. Banks's lawyer failed to present all aspects of the claim in state court.

The Supreme Court ruled that the state's unconstitutional suppression of the relevant evidence excused Mr. Banks's procedural default. However, under SPA Section 4, the federal courts would have been denied jurisdiction over this claim and it never would have been adjudicated on the merits.

The bottom line is that under the S. 1088, Mr. Banks's conviction and death sentence, which resulted from clearly unconstitutional state action, would be allowed to stand. The constitutional safeguards against prosecutorial misconduct and public confidence in the administration of justice would undoubtedly suffer.

Other examples of the draconian consequences of S. 1088 abound and will be presented to the Committee. *Habeas corpus* relief is, under both AEDPA and Supreme Court precedent, substantially restricted from what it once was. LDF urges the Committee to preserve what little remains, and reject S. 1088.

Respectfully submitted,

Theodore M. Shaw
Director-Counsel

The New York Times
nytimes.com

July 14, 2005

Convicted, Executed, Not Guilty

By BOB HERBERT

If Larry Griffin were being tried today for the murder of Quintin Moss, he would almost certainly be acquitted. The evidence is overwhelming that he did not kill Mr. Moss.

But Mr. Griffin is not being tried today. He has already been executed for the murder.

While significant, this development is not that much of a surprise to those who understand that human beings are fallible and that much of the criminal justice system in the United States is a crapshoot. Whether it is this case or some other, it is inevitable that we will learn of someone who has been executed for a crime that he or she did not commit.

Judges and juries are no less prone to mistakes than politicians, reporters, doctors, engineers or center fielders. Which is why the death penalty should be abolished.

Larry Griffin's case is probably not the best one for advancing this argument, but it's the case at hand. He was not a solid citizen. While it seems clear that he did not commit the crime for which he was executed - the killing of Mr. Moss - he did plead guilty to killing someone else.

Mr. Griffin's character, or lack of same, does not make the principle at stake any less valid. This was recognized by Jennifer Joyce, the circuit attorney in St. Louis, where Mr. Moss was murdered way back in 1980. Ms. Joyce has taken the extraordinary step of officially reopening a murder investigation after the defendant was executed.

Quintin Moss was 19 years old and a locally well-known drug dealer when he was shot 13 times in a drive-by attack on a notorious block in St. Louis known as "The Stroll." A bystander, Wallace Conners, was also shot but not seriously wounded.

Mr. Conners, who knew Larry Griffin, saw the men who drove up and opened fire. He said Mr. Griffin was not one of the men. But he was never called, either by the prosecution or the defense, to testify at Mr. Griffin's trial.

The key testimony was given by Robert Fitzgerald, a professional criminal who said he had witnessed the murder and identified Mr. Griffin as one of the shooters. Mr. Fitzgerald was in the federal witness protection program at the time. He had a number of felony charges pending and was an admitted user of heroin and speed.

A Missouri Supreme Court justice said of Mr. Fitzgerald: "The only eyewitness to the murder had a seriously flawed background, and his ability to observe and identify the gunman was also subject to question."

There was no physical evidence against Mr. Griffin, and no one else at the trial placed him at the scene of the attack. But he was convicted nevertheless, and executed by lethal injection on June 21, 1995.

Mr. Fitzgerald was formally released from custody on the day Mr. Griffin was convicted.

One of the reasons we have not had a definitive example of the execution of an innocent person is that official investigations cease once the death penalty has been carried out.

In this case, an extremely unusual private investigation was conducted after Mr. Griffin's death. It was sponsored by the NAACP Legal Defense and Educational Fund and led by Samuel Gross, a professor at the University of Michigan Law

School. That investigation has pretty much demolished Mr. Fitzgerald's account of what occurred and prompted Ms. Joyce to reopen the case.

Mr. Conners, the wounded bystander, says flatly that Mr. Fitzgerald, who died last year, was not at the scene when the attack took place. And a St. Louis police officer who supported Mr. Fitzgerald's account at the trial now says that Mr. Fitzgerald told him, "I didn't see nothing."

The officer says he can't explain why he supported Mr. Fitzgerald's false testimony at the trial.

Professor Gross, who has received extensive pro bono help from prominent law firms, has given prosecutors the names of three men he believes committed the murder, and the evidence that points to their guilt.

Ms. Joyce, who is reopening the case, was not in the circuit attorney's office when Mr. Griffin was prosecuted. She told me in a telephone conversation yesterday, "I just want to see the truth."

The investigation will be thorough, she said, adding, "I wanted to take an independent look at it, and if mistakes were made, do what I can to rectify them, recognizing that there may not be much I could do."

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July 12, 2005

VIA FACSIMILE TRANSMISSION and U.S. MAIL

Hon. Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Re: S. 1088

Dear Senator Specter:

Along with a number of my colleagues in the capital defense bar, I write to express my concern about the threatened precipitous action the Senate Judiciary Committee, and possibly the Senate itself, may take by reporting out the recently proposed habeas corpus amendments. I am a litigator, having practiced in state and federal courts across the country in a number of civil and criminal matters, for almost 25 years. I have also represented two convicted prisoners on death row in the past eight years, one in Virginia and the other in Alabama, on a part-time, pro bono basis.

One of several reasons that I accepted representation of my two capital clients was in recognition of the simple fact that over-burdened and understaffed public defenders and appointed private counsel often do not have the time and resources to represent their clients effectively in the (similarly) understaffed and overburdened state judicial systems. All too often, criminal defendants simply do not receive the fundamental due process guaranteed all citizens charged with serious crimes.

My experiences over the years have, and continue, to bear out my concerns. In representing these two young men on death row, I have of necessity undertaken very close review of the transcripts of their underlying trials. Neither received trial representation that could even be characterized as adequate nor, as a result, did they receive a fair trial.

As our system is currently set up, the last institutional protection for my clients, the only place where they can hope to correct the miscarriages of justice that were perpetrated at the trial level is through the federal habeas procedure. I just returned from an evidentiary hearing in Alabama that addressed only the issue of whether my client received effective assistance of counsel. Although we do not expect a decision until after briefing is completed in September, and although the evidence presented at the hearing made shockingly clear that the trial lawyer had not provided the minimum assistance mandated by the Constitution and by the U.S. Supreme Court

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in cases such as *Wiggins v. Smith* or the recently-decided *Rompilla v. Beard*, the state court judge unambiguously signaled his intent to deny the requested relief and to affirm our client's death sentence. Although we do not expect relief until the federal court has an opportunity to review his death sentence, we have every realistic hope that the federal system will, in fact, correct the wrong that the state system perpetrated and continues to perpetrate.

As you know, the amendments to the habeas statute in the 1980s and 90s have already curtailed access to the federal courts for habeas petitioners. Reducing access still further would be unwarranted and unwise. History has shown time and again the important role of federal courts as guardians of the rights guaranteed all people notwithstanding the actions of state courts. We therefore continue to believe that Congress should do everything within its constitutional purview to ensure that the federal courts continue to honor that responsibility. The proposed amendments are manifestly inconsistent with these principles. I therefore urge your committee to reject the proposed amendments or, at a minimum, to take sufficient time to hold comprehensive hearings with testimony from all sides of this complex issue to address the continued necessity of federal habeas jurisdiction.

I would be pleased to answer any questions you or the committee may have

Very truly yours,

Willa B. Perlmutter

WBP/amc

cc: Hon. Patrick J. Leahy

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Memorandum July 12, 2005

TO: Senate Terrorism, Technology and Homeland Security Subcommittee
Attention: Rusty Crandall

FROM: Tara A. Rainson
American Law Division
202-707-5010

SUBJECT: Federal habeas petition statistics

You requested the most recent information available on the number of habeas corpus petitions pending before all federal courts. You also requested the same information for 1994 and 1995, and in our phone conversation, you expressed an interest in statistics for 2001.

Information about habeas petitions is published by the Administrative Office of the U.S. Courts in their "Statistical Tables of the Federal Judiciary." We are sending copies of the relevant tables. Further information can be found online at http://www.uscourts.gov/library/statisticsalreports.html or by calling the Administrative Office statistics hotline at 202/505-1490.

The information we found is summarized below.

July 1, 2003 - June 30, 2004
U.S. District Courts:
23,218 general habeas petitions
227 death penalty habeas petitions
U.S. Courts of Appeals
7,025 general habeas petitions
175 death penalty habeas petitions

July 1, 2000 - June 30, 2001
U.S. District Courts:
24,570 general habeas petitions
274 death penalty habeas petitions
U.S. Courts of Appeals:
6,830 general habeas petitions
194 death penalty habeas petitions

October 1, 1994 - September 30, 1995
U.S. District Courts:
13,359 total habeas petitions
U.S. Courts of Appeals:
3,799 general habeas petitions
128 death penalty habeas petitions

October 1, 1993 - September 30, 1994
U.S. District Courts:
unavailable
U.S. Courts of Appeals
3,527 general habeas petitions
115 death penalty habeas petitions

October 1, 1992 - September 30, 1993
U.S. District Courts:
13,054 total habeas petitions
U.S. Courts of Appeals
unavailable

Table C-2.
U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Period Ending June 30, 2004

Nature of Suit	2003	2004					
			U.S. Cases		Private Cases		
		Total	Plaintiff	Defendant	Federal Question	Diversity of Citizenship	Local Jurisdiction
TOTAL CASES	**254,499**	**258,117**	**10,381**	**36,727**	**145,643**	**65,347**	**19**
CONTRACT ACTIONS, TOTAL	**32,356**	**29,687**	**3,001**	**378**	**5,888**	**20,411**	**9**
INSURANCE	8,698	8,551	27	61	1,260	7,201	2
MARINE	1,926	1,789	12	20	1,640	115	2
MILLER ACT	474	389	111	7	271	-	-
NEGOTIABLE INSTRUMENTS	538	448	49	7	50	342	-
RECOVERY OF OVERPAYMENTS AND ENFORCEMENT OF JUDGMENTS	3,466	2,914	2,576	93	145	100	-
DEFAULTED STUDENT LOANS	2,915	2,525	2,511	14	-	-	-
VETERANS' OVERPAYMENT	96	12	10	2	-	-	-
OTHER	455	377	55	77	145	100	-
OTHER CONTRACT ACTIONS	17,254	15,596	226	190	2,522	12,653	5
REAL PROPERTY ACTIONS, TOTAL	**7,503**	**6,341**	**2,262**	**304**	**636**	**3,134**	**5**
CONDEMNATION OF LAND	480	237	138	25	61	13	-
FORECLOSURE	5,405	4,778	2,047	109	225	2,393	4
RENT, LEASE, AND EJECTMENT	189	168	23	2	51	92	-
TORTS TO LAND, INCLUDING PRODUCT LIABILITY	524	426	6	22	77	321	-
OTHER REAL PROPERTY ACTIONS	905	732	48	146	222	315	1
TORT ACTIONS, TOTAL	**46,295**	**51,881**	**124**	**2,282**	**8,480**	**40,990**	**5**
PERSONAL INJURY, TOTAL	**42,233**	**45,948**	**37**	**2,123**	**6,275**	**37,508**	**5**
PERSONAL INJURY/ PRODUCT LIABILITY, TOTAL	**24,255**	**29,089**	**-**	**42**	**1,583**	**27,464**	**-**
AIRPLANE	105	100	-	4	36	60	-
MARINE	37	30	-	1	8	21	-
MOTOR VEHICLE	612	620	-	3	45	572	-
ASBESTOS	3,718	1,208	-	8	184	1,016	-
OTHER	19,783	27,131	-	26	1,310	25,795	-
OTHER PERSONAL INJURY, TOTAL	**17,978**	**16,859**	**37**	**2,081**	**4,692**	**10,044**	**5**
AIRPLANE	661	646	-	24	333	289	-
MARINE	1,885	1,859	3	52	1,601	203	-
MOTOR VEHICLE	4,550	4,328	-	527	254	3,546	1
ASSAULT, LIBEL, AND SLANDER	892	674	-	60	201	413	-
FEDERAL EMPLOYERS LIABILITY ACT	988	809	-	75	734	-	-
MEDICAL MALPRACTICE	1,612	1,359	-	707	-	652	-
OTHER	7,390	7,184	34	636	1,569	4,941	4

Table C-2. (June 30, 2004—Continued)

Nature of Suit	2003	2004					
			U.S. Cases		Private Cases		
		Total	Plaintiff	Defendant	Federal Question	Diversity of Citizenship	Local Jurisdiction
PERSONAL PROPERTY DAMAGE, TOTAL	**4,062**	**5,933**	**87**	**159**	**2,205**	**3,482**	-
FRAUD, INCLUDING TRUTH IN LENDING	2,460	4,341	71	19	1,848	2,403	-
OTHER PERSONAL PROPERTY DAMAGE	1,602	1,592	16	140	357	1,079	-
ACTIONS UNDER STATUTES, TOTAL	**168,332**	**170,168**	**4,990**	**33,758**	**130,617**	**803**	-
ANTITRUST	**836**	**692**	**15**	**4**	**673**	-	-
BANKRUPTCY, TOTAL	**3,342**	**3,982**	**20**	**34**	**3,928**	-	-
APPEAL (28 U.S.C. 158)	2,616	2,807	15	31	2,761	-	-
WITHDRAWAL (28 U.S.C. 157)	726	1,175	5	3	1,167	-	-
BANKS AND BANKING	**234**	**332**	**8**	**9**	**315**	-	-
CIVIL RIGHTS, TOTAL	**40,567**	**40,118**	**603**	**2,275**	**36,552**	**688**	-
VOTING	170	162	8	9	145	-	-
EMPLOYMENT	20,777	19,670	440	1,273	17,449	508	-
HOUSING AND ACCOMMODATIONS	1,333	1,220	27	18	1,172	3	-
WELFARE	69	57	-	3	54	-	-
OTHER CIVIL RIGHTS	18,218	19,009	128	972	17,732	177	-
COMMERCE (ICC RATES, ETC.)	**574**	**483**	**3**	**5**	**475**	-	-
ENVIRONMENTAL MATTERS	**935**	**999**	**160**	**280**	**559**	-	-
DEPORTATION	**301**	**318**	-	**268**	**50**	-	-
PRISONER PETITIONS, TOTAL	**55,112**	**53,132**	-	**12,076**	**41,051**	**5**	-
MOTIONS TO VACATE SENTENCE	5,959	5,742	-	5,742	-	-	-
HABEAS CORPUS—GENERAL	23,218	22,760	-	4,443	18,317	-	-
HABEAS CORPUS—DEATH PENALTY	227	228	-	15	213	-	-
MANDAMUS AND OTHER	1,184	1,161	-	528	633	-	-
CIVIL RIGHTS	14,787	15,113	-	1,094	14,019	-	-
PRISON CONDITION	9,737	8,128	-	254	7,869	5	-
FORFEITURE AND PENALTY, TOTAL	**2,120**	**2,112**	**1,968**	**144**	-	-	-
AGRICULTURAL ACTS	52	42	21	21	-	-	-
FOOD AND DRUG ACT	77	48	45	3	-	-	-
DRUG-RELATED SEIZURE OF PROPERTY	1,231	1,256	1,208	48	-	-	-
AIR TRAFFIC REGULATIONS	19	7	6	1	-	-	-
OCCUPATIONAL SAFETY AND HEALTH ACT	4	8	8	-	-	-	-
OTHER FORFEITURE AND PENALTY SUITS	737	751	680	71	-	-	-

Table B-7.
U.S. Courts of Appeals—Nature of Suit or Offense in Cases Arising From the U.S. District Courts, by Circuit, During the 12-Month Period Ending June 30, 2004

Nature of Suit or Offense	Total	Circuit											
		D.C.	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh
TOTAL CASES	**45,544**	**791**	**1,476**	**3,933**	**3,117**	**4,008**	**7,133**	**4,099**	**2,775**	**2,532**	**7,710**	**2,168**	**5,802**
TOTAL CRIMINAL CASES	**11,948**	**149**	**562**	**819**	**590**	**959**	**2,445**	**980**	**580**	**618**	**1,925**	**546**	**1,575**
TOTAL CIVIL CASES	**33,596**	**642**	**914**	**3,114**	**2,527**	**3,049**	**4,688**	**3,119**	**2,195**	**1,714**	**5,785**	**1,622**	**4,227**
U.S. CASES													
TOTAL	**8,287**	**442**	**246**	**536**	**690**	**1,050**	**942**	**656**	**506**	**485**	**1,156**	**444**	**1,134**
U.S. PLAINTIFF	**432**	**6**	**16**	**48**	**32**	**23**	**41**	**37**	**22**	**37**	**93**	**22**	**55**
NEGOTIABLE INSTRUMENTS	4	1	2	-	-	-	1	-	-	-	-	-	-
OTHER CONTRACT ACTIONS	15	-	2	3	1	-	4	-	-	-	4	-	1
CONDEMNATION OF LAND	7	-	-	-	-	1	1	1	-	2	1	1	-
OTHER REAL PROP. ACTIONS	10	-	-	2	1	-	1	-	-	-	2	3	1
TORT ACTIONS	6	-	-	-	-	-	-	-	-	2	-	-	4
CIVIL RIGHTS:													
EMPLOYMENT	36	-	-	1	2	4	2	6	3	6	7	1	4
OTHER CIVIL RIGHTS	18	-	-	-	1	1	3	3	-	4	2	-	4
FORFEITURE AND PENALTY	76	1	7	3	3	5	4	7	5	2	24	2	13
FAIR LABOR STAND. ACT	3	-	-	1	-	1	-	-	-	-	1	-	-
OTHER LABOR	15	-	-	4	1	-	1	1	2	-	5	1	-
SECUR., COMMOD., & EXCHG.	62	1	2	14	-	3	2	7	3	-	11	2	17
TAX SUITS	51	-	-	3	12	-	4	7	5	3	10	5	2
ALL OTHER	129	3	3	17	11	8	18	5	4	18	26	7	9
U.S. DEFENDANT	**7,855**	**436**	**230**	**488**	**658**	**1,027**	**901**	**619**	**484**	**448**	**1,063**	**422**	**1,079**
CONTRACT ACTIONS	58	6	-	3	2	7	3	5	1	4	17	1	9
REAL PROPERTY ACTIONS	45	-	2	3	5	2	5	2	2	5	12	3	4
TORT ACTIONS	231	24	19	10	15	8	22	17	10	13	62	6	25
CIVIL RIGHTS:													
EMPLOYMENT	383	62	8	20	19	36	36	27	24	21	52	17	61
OTHER CIVIL RIGHTS	450	41	11	54	30	27	66	40	24	22	84	20	31

Table B-7. (June 30, 2004—Continued)

Nature of Suit or Offense	Total	Circuit											
		D.C.	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh
U.S. DEFENDANT (CONTINUED)													
PRISONER PETITIONS:													
MOTIONS TO VACATE SEN.	2,678	23	84	153	171	463	381	218	193	154	157	102	579
HABEAS CORPUS	1,276	32	32	92	188	13	189	104	60	50	310	78	128
HABEAS CORPUS—DEATH	8	-	-	-	4	4	-	-	-	-	-	-	-
PRISONER CIVIL RIGHTS	406	82	12	13	50	2	57	26	-	21	22	65	56
PRISON CONDITION*	183	2	-	3	12	62	14	4	42	7	3	-	34
OTHER PRIS. PETITIONS	482	8	3	19	3	320	4	6	57	20	19	12	11
LABOR SUITS	25	-	4	1	3	-	1	2	1	-	10	-	3
SOCIAL SECURITY LAWS	808	4	28	52	99	46	71	103	35	93	119	64	94
TAX SUITS	131	2	5	8	12	9	14	15	4	5	37	5	15
ENVIRONMENTAL MATTERS	139	30	3	4	3	4	2	2	3	9	60	15	4
FREEDOM OF INFOR. ACT	65	26	5	3	3	2	1	4	3	-	12	3	3
ALL OTHER	487	94	14	50	39	22	35	44	25	24	87	31	22
PRIVATE CASES													
TOTAL	**25,309**	**200**	**668**	**2,578**	**1,837**	**1,999**	**3,746**	**2,463**	**1,689**	**1,229**	**4,629**	**1,178**	**3,093**
FEDERAL QUESTION	**22,219**	**171**	**510**	**2,258**	**1,512**	**1,776**	**3,335**	**2,147**	**1,549**	**1,088**	**4,145**	**998**	**2,730**
MARINE CONTRACT	78	-	4	20	3	-	24	1	1	-	10	-	15
OTHER CONTRACT ACTIONS	392	4	11	36	27	32	52	37	4	26	71	24	68
FEDERAL EMPLOYERS LIABILITY ACT	31	-	-	5	1	-	2	2	9	2	8	1	1
MARINE INJURY	84	-	3	8	7	-	48	-	-	1	11	1	5
OTHER TORT ACTIONS	410	8	8	34	21	25	51	40	70	34	65	11	43
ANTITRUST	115	3	8	26	7	6	9	13	11	5	13	4	10
CIVIL RIGHTS:													
EMPLOYMENT	2,466	37	76	251	145	149	281	263	250	164	307	119	424
OTHER CIVIL RIGHTS	3,551	40	151	335	342	231	346	418	227	179	643	173	466
PRISONER PETITIONS:													
HABEAS CORPUS	7,025	7	79	756	394	533	1,350	584	353	226	1,701	287	755
HABEAS CORPUS—DEATH	175	-	-	-	17	18	61	35	9	12	5	6	12
PRISONER CIVIL RIGHTS	2,562	19	45	317	160	9	596	266	3	141	469	255	282
PRISON CONDITION*	2,133	2	3	28	138	563	251	178	348	118	193	-	311
OTHER PRIS. PETITIONS	94	-	2	7	1	7	13	4	6	36	10	5	3
LABOR MGMT. RELAT. ACT	190	-	5	24	18	11	10	46	19	11	31	4	11
OTHER LABOR	839	14	36	70	76	63	74	119	77	43	135	32	100
COPYRIGHT, PATENT, & TRADEMARK	476	5	19	84	20	26	42	29	25	15	142	23	46

Table C-2.
U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Period Ending June 30, 2001

Nature of Suit	2000	2001					
			U.S. Cases		Private Cases		
		Total	Plaintiff	Defendant	Federal Question	Diversity of Citizenship	Local Jurisdiction
TOTAL CASES	**263,049**	**253,354**	**25,655**	**40,814**	**137,639**	**49,109**	**137**
CONTRACT ACTIONS, TOTAL	**54,494**	**45,438**	**16,366**	**413**	**6,262**	**22,376**	**21**
INSURANCE	7,636	7,602	17	53	1,094	6,436	2
MARINE	2,443	2,477	37	10	2,274	152	4
MILLER ACT	795	600	160	1	439	-	-
NEGOTIABLE INSTRUMENTS	513	573	60	9	69	435	-
RECOVERY OF OVERPAYMENTS AND ENFORCEMENT OF JUDGMENTS	25,636	16,116	15,767	125	126	98	-
DEFAULTED STUDENT LOANS	25,185	15,658	15,613	45	-	-	-
VETERANS' OVERPAYMENT	33	94	93	1	-	-	-
OTHER	418	364	61	79	126	98	-
OTHER CONTRACT ACTIONS	17,471	18,070	325	215	2,260	15,255	15
REAL PROPERTY ACTIONS, TOTAL	**6,481**	**7,296**	**4,111**	**354**	**609**	**2,152**	**70**
CONDEMNATION OF LAND	994	1,485	1,389	22	64	10	-
FORECLOSURE	4,232	4,448	2,630	111	175	1,464	68
RENT, LEASE, AND EJECTMENT	186	199	21	10	64	104	-
TORTS TO LAND, INCLUDING PRODUCT LIABILITY	364	406	11	28	89	278	-
OTHER REAL PROPERTY ACTIONS	705	758	60	183	217	296	2
TORT ACTIONS, TOTAL	**40,877**	**34,071**	**102**	**2,585**	**8,056**	**23,296**	**32**
PERSONAL INJURY, TOTAL	**36,867**	**30,194**	**28**	**2,410**	**6,683**	**21,044**	**29**
PERSONAL INJURY/ PRODUCT LIABILITY, TOTAL	**15,349**	**12,569**	**-**	**33**	**2,025**	**10,510**	**1**
AIRPLANE	197	128	-	1	33	94	-
MARINE	56	39	-	-	14	25	-
MOTOR VEHICLE	375	586	-	8	38	540	-
ASBESTOS	7,893	5,656	-	4	1,416	4,236	-
OTHER	6,828	6,160	-	20	524	5,615	1
OTHER PERSONAL INJURY, TOTAL	**21,518**	**17,625**	**28**	**2,377**	**4,658**	**10,534**	**28**
AIRPLANE	869	736	-	50	336	350	-
MARINE	4,987	2,143	5	52	1,907	179	-
MOTOR VEHICLE	4,783	4,560	-	675	178	3,706	1
ASSAULT, LIBEL, AND SLANDER	807	659	-	51	191	415	2
FEDERAL EMPLOYERS' LIABILITY ACT	1,149	1,020	-	78	942	-	-
MEDICAL MALPRACTICE	1,481	1,490	-	654	-	836	-
OTHER	7,442	7,017	23	817	1,104	5,048	25

Table C-2. (June 30, 2001—Continued)

Nature of Suit	2000	2001					
			U.S. Cases		Private Cases		
		Total	Plaintiff	Defendant	Federal Question	Diversity of Citizenship	Local Jurisdiction
PERSONAL PROPERTY DAMAGE, TOTAL	**4,010**	**3,877**	**74**	**175**	**1,373**	**2,252**	**3**
FRAUD INCLUDING TRUTH IN LENDING	2,311	2,220	55	24	1,031	1,109	1
OTHER PERSONAL PROPERTY DAMAGE	1,699	1,657	19	151	342	1,143	2
ACTIONS UNDER STATUTES, TOTAL	**161,187**	**166,535**	**5,072**	**37,462**	**122,704**	**1,283**	**14**
ANTITRUST	**792**	**770**	**18**	**9**	**743**	-	-
BANKRUPTCY, TOTAL	**3,378**	**3,012**	**48**	**40**	**2,924**	-	-
APPEAL (28 U.S.C. 158)	2,797	2,576	45	35	2,496	-	-
WITHDRAWAL (28 U.S.C. 157)	581	436	3	5	428	-	-
BANKS AND BANKING	**219**	**198**	**8**	**12**	**178**	-	-
CIVIL RIGHTS, TOTAL	**41,226**	**40,979**	**682**	**2,369**	**36,743**	**1,185**	-
VOTING	127	193	9	16	166	2	-
EMPLOYMENT	21,404	21,121	491	1,317	18,391	922	-
HOUSING AND ACCOMMODATIONS	1,289	1,320	61	43	1,203	13	-
WELFARE	74	68	1	8	59	-	-
OTHER CIVIL RIGHTS	18,332	18,277	120	985	16,924	248	-
COMMERCE (ICC RATES, ETC.)	**1,007**	**554**	**5**	**3**	**546**	-	-
ENVIRONMENTAL MATTERS	**894**	**1,794**	**213**	**282**	**1,299**	-	-
DEPORTATION	**204**	**230**	-	**153**	**77**	-	-
PRISONER PETITIONS, TOTAL	**57,706**	**59,159**	-	**14,332**	**44,813**	**2**	**12**
MOTIONS TO VACATE SENTENCE	5,916	8,673	-	8,673	-	-	-
HABEAS CORPUS—GENERAL	24,570	24,735	-	4,040	20,684	-	11
HABEAS CORPUS—DEATH PENALTY	271	219	-	16	203	-	-
MANDAMUS AND OTHER	1,167	1,152	-	570	581	-	1
CIVIL RIGHTS	14,240	13,537	-	748	12,789	-	-
PRISON CONDITION	11,542	10,843	-	285	10,556	2	-
FORFEITURE AND PENALTY, TOTAL	**2,246**	**2,143**	**2,009**	**134**	-	-	-
AGRICULTURAL ACTS	60	46	21	25	-	-	-
FOOD AND DRUG ACT	111	72	67	5	-	-	-
DRUG-RELATED SEIZURE OF PROPERTY	1,063	1,037	985	52	-	-	-
AIR TRAFFIC REGULATIONS	12	5	4	1	-	-	-
OCCUPATIONAL SAFETY AND HEALTH ACT	8	1	1	-	-	-	-
OTHER FORFEITURE AND PENALTY SUITS	992	982	931	51	-	-	-

Table B-7.
U.S. Courts of Appeals—Nature of Suit or Offense in Cases Arising From the U.S. District Courts, by Circuit, During the Twelve-Month Period Ending June 30, 2001

Nature of Suit or Offense	Total	Circuit											
		D.C.	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh
TOTAL CASES	**46,697**	**741**	**1,451**	**3,903**	**3,168**	**4,266**	**7,175**	**4,038**	**2,938**	**2,523**	**7,786**	**2,366**	**6,342**
TOTAL CRIMINAL CASES	**11,185**	**86**	**574**	**747**	**582**	**996**	**2,135**	**829**	**532**	**576**	**1,990**	**485**	**1,653**
TOTAL CIVIL CASES	**35,512**	**655**	**877**	**3,156**	**2,586**	**3,270**	**5,040**	**3,209**	**2,406**	**1,947**	**5,796**	**1,881**	**4,689**
U.S. CASES													
TOTAL	**9,245**	**429**	**273**	**629**	**772**	**1,091**	**1,022**	**645**	**513**	**480**	**1,581**	**585**	**1,225**
U.S. PLAINTIFF	**505**	**8**	**15**	**87**	**20**	**32**	**43**	**59**	**27**	**22**	**104**	**34**	**54**
NEGOTIABLE INSTRUMENTS	2	-	-	1	-	-	1	-	-	-	-	-	-
OTHER CONTRACT ACTIONS	66	-	-	26	5	4	10	6	2	1	6	4	2
CONDEMNATION OF LAND	7	-	-	-	-	-	-	1	-	-	4	2	-
OTHER REAL PROP. ACTIONS	25	-	1	1	-	4	-	1	1	4	7	4	2
TORT ACTIONS	2	-	-	-	-	-	-	1	-	-	-	-	1
CIVIL RIGHTS:													
EMPLOYMENT	37	-	-	3	3	2	2	7	6	1	9	2	2
OTHER CIVIL RIGHTS	13	-	-	1	-	1	3	3	-	2	2	1	-
FORFEITURE AND PENALTY	86	-	3	9	1	6	9	18	1	2	20	3	14
FAIR LABOR STAND. ACT	7	-	-	2	-	1	-	2	-	-	1	-	1
OTHER LABOR	18	-	1	2	-	-	1	2	1	-	6	3	2
SECUR., COMMOD., & EXCHG.	63	2	3	14	2	1	12	1	6	3	5	2	12
TAX SUITS	39	-	1	1	-	4	-	4	4	2	14	7	2
ALL OTHER	140	6	6	27	9	9	5	13	6	7	30	6	16
U.S. DEFENDANT	**8,740**	**421**	**258**	**542**	**752**	**1,059**	**979**	**586**	**486**	**458**	**1,477**	**551**	**1,171**
CONTRACT ACTIONS	61	7	-	13	3	2	6	2	2	4	15	-	7
REAL PROPERTY ACTIONS	62	6	-	-	3	-	10	7	2	4	13	6	11
TORT ACTIONS	466	15	12	9	228	23	28	13	15	14	59	8	42
CIVIL RIGHTS:													
EMPLOYMENT	405	65	13	25	27	60	40	28	16	14	58	17	42
OTHER CIVIL RIGHTS	476	48	16	49	33	36	45	44	16	20	111	26	32

Table B-7. (June 30, 2001—Continued)

Nature of Suit or Offense	Total	Circuit											
		D.C.	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh
U.S. DEFENDANT (CONTINUED)													
PRISONER PETITIONS:													
MOTIONS TO VACATE SEN.	3,048	33	119	187	150	477	444	218	199	222	195	134	670
HABEAS CORPUS	1,637	37	42	84	126	21	152	93	46	40	656	224	116
HABEAS CORPUS—DEATH	3	-	-	-	-	-	-	1	1	-	-	1	-
PRISONER CIVIL RIGHTS	335	72	12	19	23	1	57	17	2	25	29	47	31
PRISON CONDITION*	177	2	1	2	19	44	27	9	39	6	7	-	21
OTHER PRIS. PETITIONS	469	4	2	25	3	290	23	3	49	21	28	11	10
LABOR SUITS	54	3	4	1	3	8	2	9	4	2	14	-	4
SOCIAL SECURITY LAWS	711	4	13	46	83	48	79	82	41	52	111	31	121
TAX SUITS	132	3	1	12	6	8	13	7	9	10	42	11	10
ENVIRONMENTAL MATTERS	117	16	1	5	3	1	4	5	6	3	52	10	11
FREEDOM OF INFOR. ACT	78	31	3	9	5	7	4	6	3	1	7	1	1
ALL OTHER	509	75	19	56	37	33	45	42	36	20	80	24	42
PRIVATE CASES													
TOTAL	**26,267**	**226**	**604**	**2,527**	**1,814**	**2,179**	**4,018**	**2,564**	**1,893**	**1,467**	**4,215**	**1,296**	**3,464**
FEDERAL QUESTION	**23,080**	**191**	**470**	**2,193**	**1,474**	**1,859**	**3,589**	**2,253**	**1,756**	**1,282**	**3,844**	**1,123**	**3,046**
MARINE CONTRACT	85	2	5	21	1	5	20	-	2	1	11	1	16
OTHER CONTRACT ACTIONS	471	7	16	39	12	35	69	26	8	41	141	30	47
EMPLOYERS LIABILITY ACT	26	1	-	4	5	-	-	8	1	2	-	2	3
MARINE INJURY	119	-	4	4	4	5	55	4	8	4	21	-	10
OTHER TORT ACTIONS	489	14	11	35	18	36	56	35	93	27	91	9	64
ANTITRUST	102	-	5	25	6	5	11	7	8	7	10	8	10
CIVIL RIGHTS:													
EMPLOYMENT	2,849	36	57	319	162	243	357	278	317	183	280	148	469
OTHER CIVIL RIGHTS	3,609	36	118	396	304	225	351	435	281	191	667	166	439
PRISONER PETITIONS:													
HABEAS CORPUS	6,830	17	71	548	384	470	1,352	716	412	357	1,212	369	922
HABEAS CORPUS—DEATH	194	-	-	-	11	9	61	25	13	16	18	24	17
PRISONER CIVIL RIGHTS	2,510	30	52	277	141	9	636	278	2	129	495	236	225
PRISON CONDITION*	2,401	2	5	70	154	604	318	120	333	153	152	2	488
OTHER PRIS. PETITIONS	103	1	-	9	2	14	16	6	6	22	15	5	7
LABOR MGMT. RELAT. ACT	173	2	11	25	14	6	9	26	23	13	32	9	3
OTHER LABOR	876	8	30	78	72	56	98	113	78	54	149	27	113
CPYRGHT., PATENT, & TRDMRK.	502	11	28	94	29	28	29	30	33	16	141	12	51
SECUR., COMMOD., & EXCHG.	221	1	-	47	41	3	19	12	8	11	53	11	15

Table C-2
Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the Twelve-Month Period

Nature of Suit	1995	1996 Total	U.S. Cases		Private Cases		
			Plaintiff	Defendant	Federal Question	Diversity of Citizenship	Local Jurisdiction
CONTRACT ACTIONS, TOTAL	31,214	31,182	3,868	831	5,864	19,893	56
INSURANCE	7,393	7,590	28	77	800	6,658	7
MARINE	2,709	3,823	16	16	2,427	157	3
MILLER ACT	646	775	252	1	523	-	-
NEGOTIABLE INSTRUMENTS	1,499	1,536	620	39	106	771	-
RECOVERY OF OVERPAYMENTS AND ENFORCEMENT OF JUDGMENTS, TOTAL	2,330	1,822	1,388	74	73	186	-
DEFAULTED STUDENT LOANS	1,313	1,142	1,125	17	-	-	-
VETERANS' OVERPAYMENT	453	251	251	2	-	-	-
OTHER	384	429	150	55	73	186	-
OTHER CONTRACT ACTIONS	15,444	16,857	1,179	625	1,810	13,430	44
REAL PROPERTY ACTIONS, TOTAL	7,887	5,988	4,138	490	719	1,551	22
CONDEMNATION OF LAND	497	534	241	25	61	11	1
FORECLOSURE	5,077	4,972	3,725	158	570	798	20
RENT, LEASE, AND EJECTMENT	303	310	61	21	91	137	-
TORTS TO LAND, INCLUDING PRODUCT LIABILITY	415	401	20	50	90	245	1
OTHER REAL PROPERTY ACTIONS	865	862	89	210	207	345	1
TORT ACTIONS, TOTAL	47,844	52,166	101	3,264	31,780	16,906	15
PERSONAL INJURY, TOTAL	44,306	49,348	33	4,063	29,704	15,214	68
PERSONAL INJURY PRODUCT LIABILITY, TOTAL	22,388	27,517	-	89	15,419	12,010	6
AIRPLANE	119	156	-	4	91	58	-
MARINE	43	50	-	1	23	23	-
MOTOR VEHICLE	534	546	-	12	11	541	2
ASBESTOS	5,515	5,915	-	4	4,514	1,396	-
OTHER	16,979	19,957	-	67	10,513	9,559	4
OTHER PERSONAL INJURY, TOTAL	22,518	23,519	33	3,704	9,331	14,197	53
AIRPLANE	451	495	-	69	180	432	3
MARINE	1,320	1,177	12	98	1,003	364	2
MOTOR VEHICLE	5,067	6,374	-	901	164	4,305	4
ASSAULT, LIBEL, AND SLANDER	789	636	-	76	178	588	1
FEDERAL EMPLOYERS' LIABILITY ACT	3,093	1,982	-	110	1,793	-	-
MEDICAL MALPRACTICE	1,336	1,349	-	527	-	806	-
OTHER	9,607	10,627	21	1,161	1,157	8,226	56

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Table C-2. (Continued)

Nature of Suit	1994	1995 Total	U.S. Cases: Plaintiff	U.S. Cases: Defendant	Private Cases: Federal Question	Private Cases: Diversity of Citizenship	Private Cases: Local Jurisdiction
PERSONAL PROPERTY DAMAGE, TOTAL	3,356	3,421	88	241	1,026	1,960	6
FRAUD, INCLUDING TRUTH IN LENDING	1,706	1,881	42	58	688	1,091	2
OTHER PERSONAL PROPERTY DAMAGE	1,650	1,540	28	183	358	850	4
ACTIONS UNDER STATUTES, TOTAL	148,768	160,310	8,227	24,880	132,164	118	1
ANTITRUST	696	781	30	7	744	-	-
BANKRUPTCY, TOTAL	5,407	5,046	62	77	4,907	-	-
APPEAL (28 USC 158)	4,558	4,312	53	65	4,194	-	-
WITHDRAWAL (28 USC 157)	839	734	9	12	713	-	-
BANKS AND BANKING	573	432	60	98	274	-	-
CIVIL RIGHTS, TOTAL	32,422	34,160	666	2,358	31,374	-	-
VOTING	224	206	8	12	186	-	-
EMPLOYMENT	15,565	18,859	410	1,275	17,374	-	-
HOUSING AND ACCOMMODATIONS	730	735	115	38	582	-	-
WELFARE	182	118	-	13	103	-	-
OTHER CIVIL RIGHTS	15,681	16,482	135	1,020	15,327	-	-
COMMERCE (ICC RATES, ETC.)	929	560	39	4	517	-	-
ENVIRONMENTAL MATTERS	1,136	1,081	132	126	823	-	-
DEPORTATION	117	106	-	88	18	-	-
PRISONER PETITIONS, TOTAL	57,940	63,550	-	8,851	54,593	-	6
MOTIONS TO VACATE SENTENCE	4,800	5,868	-	5,808	-	-	-
HABEAS CORPUS	[illegible]	14,875	-	1,343	13,527	-	5
MANDAMUS AND OTHER	688	908	-	510	397	-	1
CIVIL RIGHTS	39,065	41,673	-	1,110	40,558	-	-
FORFEITURE AND PENALTY, TOTAL	3,335	2,617	2,282	395	-	-	-
AGRICULTURAL ACTS	135	135	15	[illegible]	-	-	-
FOOD AND DRUG ACT	263	197	180	17	-	-	-
DRUG-RELATED SEIZURE OF PROPERTY	1,324	1,042	880	82	-	-	-
AIR TRAFFIC REGULATIONS	29	11	10	1	-	-	-
OCCUPATIONAL SAFETY AND HEALTH ACT	48	33	30	3	-	-	-
OTHER FORFEITURE AND PENALTY SUITS	1,462	1,079	974	105	-	-	-

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TABLE B-7. U.S. DISTRICT COURTS, BY CIRCUIT

NATURE OF SUIT OR OFFENSE AND ... DISTRICT COURTS, BY CIRCUIT
... 30, 1995

NATURE OF SUIT OR OFFENSE	TOTAL	D.C.	CIRCUIT FIRST	SECOND	THIRD	FOURTH	FIFTH	SIXTH	SEVENTH	EIGHTH	NINTH	TENTH	ELEVENTH
TOTAL CASES	44,345	823	1,220	3,576	1,253	4,331	5,939	4,275	2,881	3,004	6,965	2,432	5,515
TOTAL CRIMINAL CASES	10,241	355	383	822	510	1,034	2,453	861	540	639	1,571	465	1,587
TOTAL CIVIL CASES	34,203	768	831	2,754	1,564	3,378	4,546	3,514	2,301	2,365	5,414	2,030	3,930
U.S. CASES	7,819	482	286	516	577	763	832	660	487	507	1,329	633	853
U.S. PLAINTIFF	869	32	27	93	56	66	107	53	40	59	137	49	115
NEGOTIABLE INSTRUMENTS	26	-	1	3	6	4	11	-	-	1	-	-	-
OTHER CONTRACT ACTIONS	63	-	3	5	2	7	14	3	-	8	13	6	7
CONDEMNATION OF LAND	114	-	-	4	-	1	3	1	-	-	97	1	1
OTHER REAL PROP ACTIONS	48	-	-	4	13	1	1	1	-	7	3	1	16
TORT ACTIONS	9	-	1	-	-	2	-	-	1	-	1	-	-
CIVIL RIGHTS:	-	-	-	-	-	-	-	-	-	-	-	-	-
EMPLOYMENT	46	-	1	4	3	3	11	6	11	-	12	1	7
OTHER CIVIL RIGHTS	33	-	-	6	2	3	3	4	3	4	3	1	4
FORFEITURE AND PENALTY	137	-	-	3	10	20	17	18	3	3	37	19	53
FAIR LABOR STAND ACT	14	-	-	-	-	1	2	1	1	2	3	1	3
OTHER LABOR	26	-	-	1	1	4	2	4	1	2	4	2	3
SECUR./COMMOD., & EXCHG.	10	-	-	-	-	2	3	1	-	1	3	1	9
TAX SUITS	68	-	1	7	4	15	3	7	3	3	23	5	7
ALL OTHER	235	31	7	15	22	12	18	11	2	11	23	14	15
U.S. DEFENDANT	7,110	450	177	493	531	699	725	607	497	448	1,212	568	743
CONTRACT ACTIONS	123	17	9	15	11	6	24	4	3	7	18	6	13
REAL PROPERTY ACTIONS	97	3	6	1	9	3	13	4	2	5	33	1	2
TORT ACTIONS	351	11	13	20	23	37	53	26	24	13	73	18	23
CIVIL RIGHTS:	-	-	-	-	-	-	-	-	-	-	-	-	-
EMPLOYMENT	143	57	5	22	15	17	13	10	15	10	41	13	10
OTHER CIVIL RIGHTS	543	62	17	56	40	16	80	43	27	37	105	30	48
PRISONER PETITIONS:	-	-	-	-	-	-	-	-	-	-	-	-	-
MOTIONS TO VACATE SENT.	2,115	44	43	131	149	270	192	213	160	146	372	107	316
HABEAS CORPUS	461	11	9	29	72	9	46	32	45	43	95	62	43
HABEAS CORPUS - DEATH	11	-	-	1	-	-	1	-	-	-	-	-	-
PRISONER CIVIL RIGHTS	555	49	1	11	70	56	33	38	52	26	67	61	67
OTHER PRIS. PETITIONS	285	9	3	14	4	111	9	7	13	13	47	26	11
LABOR SUITS	93	8	1	4	4	6	21	9	4	3	8	2	23
SOCIAL SECURITY CASES	925	7	25	43	51	83	91	131	37	33	107	103	100
FAIR HOUSING	121	-	6	15	8	38	27	20	27	13	84	25	26
ENVIRONMENTAL MATTERS	131	13	2	6	4	5	10	6	2	1	43	3	5
FREEDOM OF INFOR. ACT	61	13	2	3	3	4	5	1	3	3	11	3	5
ALL OTHER	721	130	26	72	33	41	47	65	33	42	145	32	55

TABLE B-7. U.S. COURTS OF APPEALS
NATURE OF SUIT OR OFFENSE OF APPEALS ARISING FROM THE U.S. DISTRICT COURTS, BY CIRCUIT
DURING THE TWELVE MONTH PERIOD ENDED SEP. 30, 1995

NATURE OF SUIT OR OFFENSE	TOTAL	D.C.	FIRST	SECOND	THIRD	FOURTH	FIFTH	SIXTH	SEVENTH	EIGHTH	NINTH	TENTH	ELEVENTH
							CIRCUIT						
PRIVATE CASES	26,284	286	627	1,160	1,947	1,615	3,714	2,654	1,814	1,858	4,085	1,397	3,079
FEDERAL QUESTION	21,456	227	467	1,795	1,575	2,254	3,128	2,342	1,652	1,622	3,621	1,144	1,668
MARINE CONTRACT	110	1	3	21	4	1	11	1	1	1	32	1	31
OTHER CONTRACT ACTIONS	458	9	18	33	24	30	36	21	7	18	157	35	63
EMPLOYERS LIABILITY ACT	135	-	1	15	9	3	3	74	6	8	6	6	2
MARINE INJURY	151	-	11	9	5	10	68	4	2	1	42	-	10
OTHER TORT ACTIONS	526	5	35	46	20	18	60	75	103	12	96	10	56
ANTITRUST	164	1	2	19	15	3	14	18	10	10	46	5	17
CIVIL RIGHTS:													
EMPLOYMENT	2,304	33	63	155	152	204	340	220	162	173	227	166	375
OTHER CIVIL RIGHTS	3,697	30	143	354	362	217	433	406	253	130	662	175	630
PRISONER PETITIONS:													
[redacted]	3,798	7	38	276	229	356	613	347	288	282	623	231	518
[redacted]	138	-	-	-	7	15	34	4	13	24	11	-	18
PRISONER CIVIL RIGHTS	7,528	58	47	428	438	1,166	1,208	889	541	651	863	362	857
OTHER PRIS. PETITIONS	63	-	3	9	-	10	13	-	3	3	7	11	5
LABOR MGMT. RELAT. ACT	246	-	13	18	28	13	31	41	19	20	42	9	12
OTHER LABOR	1,038	16	26	109	69	74	89	136	105	50	263	40	63
CPYRGHT, PATENT & TRDMRK	461	1	18	80	22	42	28	23	11	16	131	12	69
SECUR., COMMOD, & EXCHG	214	-	5	38	12	8	21	11	19	10	67	19	14
CONST. OF STATE STATS	133	4	2	12	10	12	10	18	7	12	28	4	4
ALL OTHER	1,350	22	57	173	109	68	122	136	95	82	316	57	113
DIVERSITY OF CITIZENSHIP	3,751	59	160	373	377	361	585	312	162	236	464	253	411
INSURANCE	766	5	16	42	62	63	114	64	57	47	156	40	80
OTHER CONTRACT ACTIONS	1,417	22	80	195	137	120	166	107	54	98	193	62	123
REAL PROPERTY ACTIONS	108	2	5	12	3	16	7	8	3	11	15	9	13
PERSONAL INJURY - PROD. LIABILITY	411	3	13	26	57	35	72	32	-	33	21	44	73
OTHER PERSONAL INJURY	816	20	33	71	71	104	181	82	7	30	57	70	30
PERSONAL PROP. DAMAGE	187	7	10	24	21	20	33	16	-	13	16	6	21
ALL OTHER	48	-	3	3	4	3	12	3	1	2	6	2	9
GENERAL LOCAL JURISDICTION	35	-	-	-	35	-	-	-	-	-	-	-	-
CONTRACT ACTIONS	8	-	-	-	8	-	-	-	-	-	-	-	-
REAL PROPERTY ACTIONS	7	-	-	-	7	-	-	-	-	-	-	-	-
TORT ACTIONS	11	-	-	-	11	-	-	-	-	-	-	-	-
PRISONER PETITIONS	-	-	-	-	-	-	-	-	-	-	-	-	-
ALL OTHER	9	-	-	-	9	-	-	-	-	-	-	-	-

U.S. District Courts - Civil Cases Commenced by Basis of Jurisdiction

and [redacted] Ended September 30, 1993, and 1994

NATURE OF SUIT	1993	1994					
		Total	U.S. CASES		PRIVATE CASES		
			Plaintiff	Defendant	Federal Question	Diversity of Citizenship	Local Jurisdiction
TOTAL CASES							
CONTRACT ACTIONS, TOTAL	35,146	31,154	4,030	701	6,059	19,349	11
INSURANCE	7,385	7,385	29	104	909	6,376	5
MARINE	3,017	2,708	34	33	1,178	150	3
MILLER ACT	636	686	281	5	396	-	-
NEGOTIABLE INSTRUMENTS	1,966	1,448	560	63	195	771	-
RECOVERY OF OVERPAYMENTS AND ENFORCEMENT OF JUDGMENTS, TOTAL	4,519	2,230	2,097	81	63	67	1
DEFAULTED STUDENT LOANS	3,516	1,755	1,756	17	-	-	-
VETERANS' OVERPAYMENT	1,306	552	552	1	-	-	-
OTHER	337	396	149	64	63	67	1
OTHER CONTRACT ACTIONS	17,467	16,444	1,044	518	1,824	10,852	20
REAL PROPERTY ACTIONS, TOTAL	3,896	7,466	4,344	514	1,006	1,545	33
CONDEMNATION OF LAND	774	435	344	33	20	77	-
FORECLOSURE	5,466	5,573	4,401	108	479	545	26
RENT, LEASE AND EJECTMENT	545	963	60	35	115	115	1
TORTS TO LAND/EXCLUDING PRO QUST LIABILITY	454	418	44	43	87	243	1
OTHER REAL PROPERTY ACTIONS	670	165	125	240	229	280	1
TORT ACTIONS, TOTAL	63,269	47,941	193	3,014	11,457	33,039	89
PERSONAL INJURY, TOTAL	58,748	44,306	43	2,830	10,457	30,923	64
PERSONAL INJURY - PRODUCT LIABILITY, TOTAL	10,869	12,218	-	63	4,077	17,944	10
AIRPLANE	85	115	-	3	8	104	-
MARINE	69	42	-	-	23	13	-
MOTOR VEHICLE	690	824	-	10	52	435	-
ASBESTOS	5,648	8,618	-	8	4,171	3,238	-
OTHER	15,456	12,279	-	28	545	14,496	10
OTHER PERSONAL INJURY, TOTAL	39,737	32,016	43	2,767	6,660	13,575	54
AIRPLANE	834	967	-	46	158	354	1
MARINE	2,801	1,830	11	116	1,479	321	3
MOTOR VEHICLE	5,870	5,067	-	154	165	4,676	3
ASSAULT, LIBEL, AND SLANDER	718	780	-	71	192	553	2
FEDERAL EMPLOYERS' LIABILITY ACT	2,193	2,062	-	136	1,467	-	-
MEDICAL MALPRACTICE	1,379	1,832	-	496	-	845	1
OTHER	6,144	6,827	31	1,068	1,288	7,824	47

Table C-2. (Continued)

NATURE OF SUIT	1993	1994 Total	U.S. CASES		PRIVATE CASES		
			Plaintiff	Defendant	Federal Question	Diversity of Citizenship	Local Jurisdiction
PERSONAL PROPERTY DAMAGE, TOTAL	8,613	3,388	88	354	1,010	2,011	8
FRAUD INCLUDING TRUTH IN LENDING	1,766	1,704	52	35	604	1,006	2
OTHER PERSONAL PROPERTY DAMAGE	1,787	1,650	36	204	398	1,011	3
ACTIONS UNDER STATUTES, TOTAL	142,599	140,784	7,691	15,327	117,234	119	17
ANTITRUST	653	644	25	5	607	-	-
BANKRUPTCY, TOTAL	5,203	5,497	81	80	5,318	-	-
APPEAL (28 USC 158)	4,852	4,958	81	78	4,858	-	-
WITHDRAWAL (28 USC 157)	1,410	539	10	12	917	-	-
BANKS AND BANKING	601	573	106	183	271	-	-
CIVIL RIGHTS, TOTAL	27,631	25,623	719	2,266	18,236	-	-
VOTING	213	224	6	10	208	-	-
EMPLOYMENT	15,962	15,363	439	1,697	14,475	-	-
HOUSING AND ACCOMMODATIONS	630	730	141	27	522	-	-
WELFARE	114	122	3	27	92	-	-
OTHER CIVIL RIGHTS	13,776	15,561	107	1,697	14,377	-	-
COMMERCE (ICC RATES, ETC.)	1,941	828	77	11	841	-	-
ENVIRONMENTAL MATTERS	1,804	1,110	223	221	663	-	-
DEPORTATION	104	117	-	68	16	-	-
PRISONER PETITIONS, TOTAL	13,461	37,444	-	7,700	[redacted]	-	18
MOTIONS TO VACATE SENTENCE	3,277	4,625	-	4,628		-	-
HABEAS CORPUS	10,084	13,259	-	1,441		-	10
MANDAMUS AND OTHER	1,000	838	-	491		-	4
CIVIL RIGHTS	33,800	38,056	-	1,140	895	37,023	-
FORFEITURE AND PENALTY, TOTAL	4,470	5,385	3,067	218	-	-	-
AGRICULTURAL ACTS	115	188	80	76	-	-	-
FOOD AND DRUG ACT	390	263	230	13	-	-	-
DRUG-RELATED SEIZURE OF PROPERTY	1,354	1,326	1,260	66	-	-	-
AIR TRAFFIC REGULATIONS	43	29	28	1	-	-	-
OCCUPATIONAL SAFETY AND HEALTH ACT	69	49	48	1	-	-	-
OTHER FORFEITURE AND PENALTY SUITS	1,906	1,402	1,401	61	-	-	-

Table B-7.
U.S. Courts of Appeals - Nature of Suit or Offense of Cases Arising from the [redacted]
During the Twelve-Month Period Ended [redacted]

NATURE OF SUIT OR OFFENSE	CIRCUIT												
	TOTAL	D.C.	FIRST	SECOND	THIRD	FOURTH	FIFTH	SIXTH	SEVENTH	EIGHTH	NINTH	TENTH	ELEVENTH
TOTAL CRIMINAL CASES	10,274	183	349	997	843	905	1,449	818	629	621	1,843	534	1,904
TOTAL CIVIL CASES	32,309	687	918	2,701	2,710	3,738	4,170	3,163	2,259	1,966	5,003	1,851	3,979
U.S. CASES													
U.S. PLAINTIFF	653	11	35	184	47	95	121	63	50	37	116	50	145
NEGOTIABLE INSTRUMENTS	49	-	2	1	1	-	28	-	-	-	4	4	8
OTHER CONTRACT ACTIONS	77	1	5	3	11	9	10	4	1	6	9	6	10
CONDEMNATION OF LAND	17	-	-	6	-	4	1	3	-	-	3	1	-
OTHER REAL PROP. ACTIONS	85	-	3	14	1	8	3	9	7	10	3	11	10
TORT ACTIONS	6	-	-	1	0	1	1	1	-	-	0	-	-
CIVIL RIGHTS:													
EMPLOYMENT	46	3	2	3	3	3	6	7	10	3	6	3	6
OTHER CIVIL RIGHTS	36	-	1	6	4	4	1	-	3	1	4	2	4
FORFEITURE AND PENALTY	109	1	6	15	6	15	15	20	6	11	10	7	10
FAIR LABOR STAND. ACT	22	1	1	6	4	2	2	1	1	-	-	1	1
OTHER LABOR	37	1	6	4	1	3	5	2	-	1	2	1	1
SECUR., COMMOD., & EXCHG.	37	1	-	6	-	4	2	1	7	1	7	-	7
TAX SUITS	68	-	3	12	1	4	10	4	15	3	10	12	10
ALL OTHER	340	8	8	39	14	11	38	33	6	17	30	18	32
U.S. IS DEFENDANT	5,410	418	266	917	494	525	541	615	444	453	1,106	171	720
CONTRACT ACTIONS	150	13	12	13	10	20	29	9	8	11	27	5	23
REAL PROPERTY ACTIONS	80	2	4	2	2	11	6	6	2	6	10	4	11
TORT ACTIONS	678	34	33	29	16	24	30	18	10	23	34	25	47
CIVIL RIGHTS:													
EMPLOYMENT	324	40	7	25	21	31	18	28	26	18	49	32	34
OTHER CIVIL RIGHTS	848	53	17	72	54	39	17	25	37	30	113	35	58

Table B-7. (Continued)

NATURE OF SUIT OR OFFENSE	TOTAL	D.C.	CIRCUIT: FIRST	SECOND	THIRD	FOURTH	FIFTH	SIXTH	SEVENTH	EIGHTH	NINTH	TENTH	ELEVENTH
U.S. DEFENDANT – Continued													
PRISONER PETITIONS:													
MOTIONS TO VACATE SENT.	1,774	41	60	164	153	312	179	200	134	153	213	71	229
HABEAS CORPUS	430	18	-	17	40	11	28	49	33	36	92	50	50
HABEAS CORPUS - DEATH	-	-	-	-	-	-	-	-	-	-	-	-	-
PRISONER CIVIL RIGHTS	506	40	6	35	60	44	13	44	58	54	23	62	34
OTHER PRIS. PETITIONS	329	10	-	17	2	108	4	7	28	7	5	24	16
LABOR SUITS	87	8	3	8	6	3	7	5	6	-	15	6	1
SOCIAL SECURITY LAWS	551	5	43	34	44	84	101	143	23	107	100	57	62
TAX SUITS	309	-	9	21	23	14	20	53	17	16	106	34	21
ENVIRONMENTAL MATTERS	103	5	4	4	15	6	6	2	11	4	4	3	3
FREEDOM OF INFOR. ACT	86	47	4	11	3	4	3	3	2	-	9	6	3
ALL OTHER	708	103	41	66	36	36	72	45	41	25	106	24	44
PRIVATE CASES													
[redacted]													
FEDERAL TAX SUITS	24,264	257	486	1,445	1,680	1,701	3,687	1,104	1,560	1,968	3,444	1,136	2,347
MARINE CONTRACT	108	-	3	21	1	10	27	1	3	-	10	1	26
OTHER CONTRACT ACTIONS	648	3	24	77	30	41	104	44	17	21	228	40	88
EMPLOYERS LIABILITY ACT	58	-	-	3	12	2	3	13	7	1	8	2	6
MARINE INJURY	144	-	6	8	4	2	61	2	4	4	36	-	11
OTHER TORT ACTIONS	525	7	17	37	16	22	67	32	85	17	108	30	81
ANTITRUST	187	6	6	25	13	10	30	16	6	17	38	8	34
CIVIL RIGHTS:													
EMPLOYMENT	1,911	37	62	148	181	162	261	233	153	145	173	104	290
OTHER CIVIL RIGHTS	3,457	58	158	382	614	186	357	386	288	200	386	186	439
PRISONER PETITIONS – [redacted]													
[redacted]													
PRISONER CIVIL RIGHTS	6,364	49	49	306	443	761	1,329	677	477	643	811	396	774
OTHER PRIS. PETITIONS	76	-	1	4	1	6	35	3	-	6	4	5	6
LABOR MGMT. RELAT. ACT	255	7	10	22	35	15	15	41	51	14	63	14	15
OTHER LABOR	864	13	17	73	46	54	101	114	77	52	170	40	64
CPY RIGHT, PATENT & TRDMRK	401	2	4	53	28	13	23	32	13	13	109	14	45
SECUR., COMMOD., & EXCHG	242	3	8	47	13	10	17	14	25	3	72	13	16
CON ST. OF STATE STATS.	106	-	2	13	8	10	9	10	11	4	33	6	9
ALL OTHER	1,444	37	36	161	115	70	179	95	91	70	272	78	90

PAUL A. RENNE
ONE MARITIME PLAZA
20TH FLOOR
SAN FRANCISCO 94111-3580
(415) 693-2073

July 20, 2005

Via Facsimile

Senator Patrick Leahy
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510
Attention: Julie Katzman

Senator Arlen Specter
711 Hart Senate Office Building
Washington, D.C. 20510
Attention: Brett Tollman

Senator Diane Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510
Attention: Brett Speigel

Dear Senators Specter, Leahy and Feinstein:

I write this letter as a former Assistant U.S. Attorney in the District of Columbia as well as a private attorney with experience representing a defendant in a death penalty appeal, to express my strenuous opposition to S.1088, the "Streamlined Procedures Act." I believe this Act would constitute a retreat from the safeguards necessary to assure that innocent individuals are not put to death.

In addition, I ask that the attached memorandum, which provides detailed information about the capital punishment system in California, be placed into the records. The memorandum demonstrates that, in California, the source of the lapse of time between the offense and conclusion of a death penalty case is a result of state court processes that are particular to California. I speak about this matter from personal experience, having represented a California death row inmate for well over a decade in the state system before his death sentence, which initially was affirmed on appeal, was finally overturned by the California Supreme Court following reference to a Special Master as a result of a grant of the state habeas petition. In sum, not only will S. 1088 all-but eliminate federal habeas review, certainly, in so far as California is concerned, it will not make a significant change in the time these cases require for appropriate judicial review.

Sincerely yours,

Paul A. Renne

957799 v1/SF

INTRODUCTION

Several factors contribute to the unique situation that exists in California with regard to capital appeal and post-conviction (i.e., state habeas corpus) proceedings. One factor, according to California Supreme Court Chief Justice Ronald M. George, is the degree of scrutiny that death penalty cases receive before the Court. The Chief Justice recently said, "We don't turn them out like Texas, and I'm glad that we don't."[1] Others, set forth below, are circumstances idiosyncratic to California that contribute to the length of time between commission of the crime, judgment, and final resolution of the case. These circumstances are not the product of federal review or the statutes governing section 2254 cases; consequently, amending the federal habeas statutes would do little, if anything, to reduce this time period in California. In short, the factors are state-created, unique, and not only produce a lengthy state court review process, but require the federal courts to devote significantly more resources to the cases.

I. What accounts for the lapse of time between commission of the crime and finality in state court in California?

1. The Lack of Qualified Counsel Willing to Undertake Representation on Automatic Appeal and in Habeas Corpus.

There is a chronic and widely reported shortage of willing and qualified counsel to represent individuals in capital cases before the California Supreme Court, where habeas cases originate. As a result, death-sentenced individuals wait years for appointment of counsel before the appellate process can begin. Presently, there are 105 death row inmates without counsel for either the automatic appeal or the state habeas proceeding and an additional 166 individuals with counsel for the appeal

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1 *See* Egelko, *State Chief Justice Praises Long Appeals Process*, San Francisco Chronicle, December 15, 2004, at A21

but without counsel for state habeas proceedings.[2] Figures for the period from January 2000 to July 2005 reveal that, on average, individuals waited 55 months, more than four and a half years, from the date of the trial judgment until a lawyer was appointed for the automatic appeal. Currently, in mid-2005, counsel are appointed for the automatic appeal in cases where judgment was rendered by the trial court in 1999 or 2000. In addition, in several cases, the California Supreme Court has been required to remove or allow counsel to withdraw, creating an additional time lapse while the replacement counsel becomes familiar with the case.

2. The State Constitutional Requirement that Death Judgments Be Appealed Directly to the California Supreme Court, which has a Unitary System of Review.

California's process for appellate and habeas corpus review creates a "bottleneck" in the California Supreme Court. Under the state Constitution, every capital judgment is automatically appealed directly to the California Supreme Court. In addition to the automatic appeal, under procedures adopted by the California Supreme Court, the state habeas proceeding -- known in other states as post-conviction review -- also is handled by the California Supreme Court as part of its unitary review procedure. There are currently 646 men and women on California's Death Row. As a result, the resources of the seven-justice court, which also oversees the entire California court system and decides other important cases in all areas of law, are severely strained. Although death sentences have decreased in recent years, the sheer number of death judgments over the past twenty-five years (well over 600, with an average record length of almost 15,000 pages) has made the process of recruiting counsel, presenting the appeal and state habeas, and reviewing the case, time-

2 Unless otherwise specified, data presented in this memorandum were obtained through on-line research utilizing resources such as Westlaw and LEXIS, the website of the California Supreme Court at http://www.courtinfo.ca.gov/courts/supreme/ and the website of the California Department of Corrections at http://www.corr.ca.gov/CommunicationsOffice/CapitalPunishment/default.asp.

consuming for the court. One commentator has dubbed the Court's effort to combine the automatic appeals and state habeas "a disastrous failure."[3]

Currently available statistics illustrate the problem. For example, in the five-year period between 1996-2000, 183 death judgments were entered in the California trial courts, an average of 36.6 a year, including 42 in 1999. During those same five years, the California Supreme Court decided 68 capital appeals, an average of 13.6 per year. In short, the Court, despite all its efforts, fell further and further behind and the length of time between judgment and the decision on the appeal steadily increased.[4] As another example, in 2005, the California Supreme Court has thus far issued twelve automatic appeal opinions. The judgments in these cases were rendered in the trial courts between December of 1990 and March of 1995. The average time from judgment to California Supreme Court decision was approximately 12 years and four months. The average time from the date of offense to California Supreme Court decision was approximately 15 years and nine months.

3. Appointment of Habeas Counsel & the Separate Habeas Process.

In California, lawyers appointed for the automatic appeal are not required to accept an appointment for the state habeas proceedings. Consequently, there is a lengthy period between the conclusion of the trial and the appointment of habeas counsel. There are currently 166 death-sentenced individuals who have appellate counsel, but no lawyers to litigate the state habeas proceeding. Approximately thirty of these cases involve death judgments entered in the trial court between 1989 and 1995. The list of appointments made during the period January 2000 to present

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3 *See* Uelman, *Supremely Futile: The George Court's Sisyphean Struggle*, California Lawyer (July 2005), at 28.

4 *See* http://itrs.scu.edu/instructors/uelmen.

reveals that the average wait from the trial judgment until appointment of state habeas counsel was 84.9 months, just over seven years. Looking at the last six state habeas appointments made in 2005, the time from trial judgment to appointment of habeas counsel was 98.5 months, more than eight years.

In addition, in some cases, the state habeas proceedings continue long after the automatic appeal is concluded. For example, the recent decision in *In re Sakarias*, 35 Cal.4th 140, 25 Cal.Rptr.2d 65 (2005) was issued on March 5, 2005, five years after the automatic appeal was decided, *see People v. Sakarias*, 22 Cal.4th 596, 94 Cal.Rptr.2d 17 (2000), and over 14 years after the judgment in the trial court. In fact, 14.27 years represents the average time between trial court judgment and the decision on state habeas in the cases resolved by the California Supreme Court between 2000 and present. In sum, in the vast majority of cases, an affirmance in the automatic appeal does not open the portal into the federal courts because convictions are often affirmed on direct appeal years before the California Supreme Court's decision in the state habeas proceeding.

II. Why do California cases require more federal resources or oversight – and thus take more time -- particularly in the district courts?

1. The California Supreme Court's Affirmance Rate.

For nearly two decades, the California Supreme Court's affirmance rate has been among the highest in the country. Combined with the raw number of capital cases, this results in an extraordinarily high number of cases proceeding into federal district court. From 1979 through 1986, the California Supreme Court affirmed only 7.8 percent of the 64 judgments that it reviewed. Between 1987 and March of 1989, following a change in personnel on the Court, it affirmed 71.8 percent of the 71 judgments that it reviewed. During a two-year period, the court went from the third

lowest affirmance rate to the eighth highest in the nation.[5]

Between 1990 and1992, the California affirmance rate reached 94.2 percent, which placed it first in the United States, ahead of Georgia (70.3 percent), Florida (62.6 percent) and Texas (76.9 percent). This high affirmance rate continues to the present. For example, between 1996 and 2003, the California Supreme Court issued 98 death penalty decisions. It reversed a total of 10 cases for an affirmance rate of 89.8 percent.[6] The California Supreme Court's tolerance for constitutional error, frequently expressed through a finding that a gross constitutional violation was "harmless" to the death judgment, has been extremely high. As a result, the federal courts in California receive cases that, in other states, would never progress into federal court.

2. Lack of Discovery in Connection with Post-Conviction Proceedings.

Discovery is a critical route by which petitioners in states other than California investigate constitutional violations and develop facts in support of claims of error. Until 2003, no post-conviction litigant in California obtained discovery except in connection with the rare reference (i.e., evidentiary) hearing.[7] Effective January 1, 2003, the legislature abrogated the state courts' decisional law, and authorized discovery.[8] However, virtually no condemned prisoners obtained discovery until several months *after* a March 2004 decision of the California Supreme Court.[9] Fact-finding mechanisms in state court, such as discovery, lead to more streamlined, efficient processes in federal

5 *See* Uelmen, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 Loyola L.A L.Rev. 237, 237-238 (1989).)

6 *See* http://itrs.scu.edu/instructors/uelmen.

7 *See People v Gonzalez*, 51 Cal.3d 1179 (1990).

8 *See* California Penal Code section 1054.9.

9 *See In re Steele*, 32 Cal.4th 682 (2004).

district court. The federal courts in California in section 2254 proceedings have yet to reap the benefits of California's new law. Because, in most instances, procedures in federal court offer the first opportunity for a California capital inmate to obtain discovery, the time and resources expended on the cases by the federal district courts are increased.

3. The Court's Self-Acknowledged Inability to Provide the Federal District Courts with Its Reasoning Process in Ruling on Habeas Corpus Petitions.

The California Supreme Court has created a labyrinthine set of procedural rules combined with what are typically one-page orders. These orders are bereft of any legal or substantive reasoning for denials of claims on the merits in capital state habeas cases. The procedural rulings and the lack of explanation for merits denials complicate the federal courts' ability to review California cases. In 2003, in response to a request from the Chief Judge of the Ninth Circuit to the California Supreme Court to issue more explanatory orders in capital state habeas cases in order to facilitate federal court review, Chief Justice George advised the federal court that such expanded, explanatory orders "would substantially outweigh any benefits" to the state court system.[10] No less an authority than former Justice Janice Rodgers Brown, who served on the California Supreme Court for nine years before being appointed by President Bush to the D.C. Circuit, decried the rules applied by that Court in state habeas cases, explaining that the state Supreme Court has unwisely created a "Byzantine system of procedural hurdles" that undermine the goals of integrity, finality and comity, and create unnecessary and time-consuming layers of review. "[W]e better serve the purpose of the 'Great Writ' . . . and the concern for promptly resolving these claims by abandoning the effort to erect meaningless procedural impediments in favor of the one certainty for ensuring expeditious review of

10 *See* Letter, Chief Justice George to Chief Judge Mary M. Schroeder, October 29, 2003.

capital habeas petitions: full merit review without regard to procedural bars."[11]

4. The Lack of Reference Hearings in State Court.

The California Supreme Court very rarely grants a habeas evidentiary hearing, a proceeding where disputed facts are resolved through the presentation of evidence by both parties. Between April of 1979 and April of this year, the California Supreme Court issued orders for evidentiary hearings B known as reference hearings B in 37 capital habeas writ proceedings out of the hundreds it considered. This significantly distinguishes California from most other jurisdictions. What is typical, sometimes even mandatory, in other states -- an evidentiary hearing in state post-conviction -- is a novelty in California. As a result, federal court hearings and fact-finding proceedings for common post-conviction claims, such as violations of prosecutorial disclosure obligations, ineffective assistance of counsel, or conflict of interest situations, are necessary in many, many cases and increase considerably both the time and resources expended on the cases by the federal district courts.

CONCLUSION

In short, the California situation is unique. The state system has huge problems and these problems complicate the post-conviction process in state court and in the federal district court; result in delay within the state system; and cause the cases to move more slowly once they move into the federal habeas process. None of these problems will be ameliorated by the proposed legislation.

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11 *See In re Seaton*, 34 Cal.4th 192, 209 (2004)(dissenting opinion of Brown, J.)(internal brackets and quotations deleted for readability); *see In re Gallego*, 18 Cal.4th 832, 842 (1998) (opinion of Brown, J.).

STATEMENT OF BARRY C. SCHECK
Co-Director, Innocence Project
Prof. Of Law, Cardozo Law School, Yeshiva University

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

"Habeas Corpus Proceedings and Issues of Actual Innocence"

July 13, 2005

Statement Of Barry C. Scheck

Chairman Specter and Members of the Committee:

In an epilogue to his 1995 decision vacating the conviction and death sentence of Ron Williamson of Oklahoma, United States District Court Judge Frank Seay wrote:

> While considering my decision in this case I told a friend, a layman, I believed the facts and law dictated that I must grant a new trial to a defendant who had been convicted and sentenced to death. My friend asked, "Is he a murderer?" I replied simply, "We won't know until he receives a fair trial."
>
> God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case. Accordingly, the Writ of Habeas Corpus shall issue...[1]

On remand, both Ron Williamson, who came within five days of execution, and Dennis Fritz, who served twelve years of a life sentence, proved their innocence through a series of DNA tests which also identified the real murderer, Glen Gore. Gore was the chief witness against Williamson and Fritz, and Judge Seay found Williamson's lawyer grossly ineffective on a number of grounds, including the failure to investigate Gore as a possible suspect. He also ruled that suppressed *Brady* material, and refusal by the trial court to appoint a forensic expert (an *Ake* error[2]), were material due process violations. All these contentions were rejected by the Oklahoma Criminal Court of Appeals as procedurally defaulted or without merit such that, under S.1088, Judge Seay would have surely been deprived of jurisdiction to hear the case and reach the merits.[3] If S. 1088 had been the law in 1995, Ron Williamson would have surely been dead, an innocent man

[1] *Williamson v. Reynolds*, 904 F. Supp. 1529, 1576-77 (E.D. Ok. 1995).

[2] *See Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985).

[3] *See Williamson v. State*, 852 P.2d 167 (Okla.Crim.App.1993), *cert. denied*, 511 U.S. 1115, 114 S.Ct. 2122, 128 L.Ed.2d 677 (1994).

executed; Dennis Fritz would probably still be in prison; and Glen Gore would have had an opportunity to commit still more crimes (Gore was in prison on other charges, but eligible for imminent release before DNA tests identified him as the real murderer). And, needless to say, the successful federal civil rights lawsuit brought by Williamson and Fritz that exposed stunning misconduct by state and local police authorities, such as suppression of the fact that Gore told another inmate he committed the murder just before he testified against them, would have never occurred.[4]

The take-home lesson from the Williamson and Fritz case is that the wrongly convicted ordinarily cannot prove their innocence until they have competent counsel, appropriate experts, access to suppressed exculpatory evidence, and perhaps most important of all, a full and fair hearing on the merits of their procedural due process claims. The reason we care about procedural due process, after all, is that it leads to accurate results, and its opposite leads to the opposite. That is exactly why so many innocence cases do not start out presenting innocence claims at all, but rather procedural due process violations, and proof of innocence only emerges once the rubble of other legal errors has been swept aside. So any habeas bill that tries to restrict claims to just those that start off with fully developed showings of innocence will -- by making sure that innocence showings don't emerge from the rubble -- bury them.

[4] *See Fritz et al., v. City of Ada, et al.,* Case No. CIV 00-194-D (E.D. Okla) (Plaintiffs' response to motions for summary judgment, filed January 8, 2002). It bears noting that the most egregious acts of official misconduct were not disclosed before Williamson and Fritz were exonerated, but only came to light in the course of discovery in the resulting federal civil rights action. *See id.; see also* Scheck, Neufeld and Dwyer, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 163-203 (New American Library ed. 2003). John Grisham is currently writing a non-fiction book about this case that is sure to provide even more insight into the shocking facts.

Yet that is exactly what the sweeping curtailment of federal habeas jurisdiction proposed by S.B. 1088 would do, as the *Washington Post* editorialized on Sunday.[5] It would bury the truly innocent under a welter of state and federal procedural bars. It would undermine efforts to raise the low standard of representation of the indigent tolerated by state courts (a competent, adequately funded lawyer is the best protection the wrongly convicted can get).[6] And inevitably, by keeping the innocent in prison and out of court, it will leave the real perpetrators free to commit more crimes. In an era where DNA testing and other forms of proof demonstrate that more innocents are wrongly convicted than anyone ever suspected, congressional efforts should be focused on lowering the procedural hurdles to proving innocence and speeding up post-conviction processes so that more constitutional claims can be heard on the merits.[7] S. 1088 takes us in precisely the wrong direction.

I. Dimensions of the Innocence Problem

In the last sixteen years, primarily due to the impact of DNA testing, it has become clear that wrongful convictions plague our justice system in far greater numbers than ever imagined. To date there have been 159 post-conviction DNA exonerations in the United States. In forty-five of those cases, the real perpetrator was then

[5] "Stop This Bill" (editorial), THE WASHINGTON POST, July 9, 2005, p.B06.

[6] See, e.g., Gideon's Broken Promise, American Bar Association Standing Committee on Legal Aid and Indigent Defense available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/; In Defense of Public Access to Justice, National Legal Aid and Defenders Association & National Association of Criminal Defense Lawyers, available at http://www.nacdl.org/public.nsf/DefenseUpdates/Avoyelles.

[7] As has long been documented, most post-conviction delays are in the state systems and those systems routinely give short shrift to innocence claims. See, Eric M. Freedman, Innocence, Federalism, and the Capital Jury, 18 N.Y.U. Rev. Law & Soc. Change 315 (1990-91); Legislative Modification of Habeas Corpus in Capital Cases, 44 Rec. Assoc. Bar 848 (1989).

apprehended.[8] An additional 196 convicted defendants - almost all in murder cases - were exonerated between 1989 and 2003, without benefit DNA evidence.[9] There is every reason to believe these exonerations are just the tip of an iceberg.[10] Forensic experts believe less than 20% of serious criminal cases contain any biological evidence where DNA testing could be employed to help protect the innocent and identify the guilty.

So what can be done about the other 80% of cases where the usual causes of wrongful convictions -- ineffective lawyers, suppressed *Brady* material, prosecutorial or police misconduct, fraudulent and flawed forensic science, mistaken identifications, false confessions, or perjury – are at play? DNA testing is not a panacea for our justice system but a learning moment. The DNA exoneration cases teach us that *more* must be done to correct the weaknesses in our fact-finding system, to strengthen procedural due process protections, especially effective representation by counsel, not less. That is why I am especially troubled by the provisions of S. 1088 that severely curtail federal review of ineffective assistance of counsel claims, and by those provisions which give the Attorney General, rather than the courts, the power to determine whether or not a state provides competent counsel to death row inmates in state postconviction proceedings.

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[8] *See* www.innocenceproject.org for a list and case summaries of the 159 post-conviction DNA exonerations in the United States to date.

[9] *See* Samuel R. Gross et al., Exonerations in the United States, 1989 - 2003, 95 J. Crim. L. & Criminology 523 (2005).

[10] Just consider the fact that since 1989, thousands have been arrested and indicted but subsequently exonerated by DNA tests conducted by the FBI, state labs, and private labs. In the early and mid-1990s, when the FBI laboratory did the majority of DNA testing for state criminal prosecutions, its own review determined that over 25% of those tests definitively excluded the prime suspect. *See* William Sessions, "DNA Tests Can Free the Innocent. How Can We Ignore That?" WASHINGTON POST, Sept. 21, 2003. Two weeks ago Dr. Dwight Adams, head of the FBI Laboratory, confirmed that those numbers have held steady in subsequent years. Although they do not always keep formal track of these exclusions, other public and private laboratories with whom I have conferred estimate similar exclusion rates.

II. The Long, Hard Road to Proving Innocence

There is no better way to explain the disastrous effect this bill would have on innocent persons in our nation's prisons and death rows than through the case histories of individuals who survived that nightmare – but who would not be free men today had the proposed bill been law when their cases were before the courts. Their cases demonstrate *just how hard it already is*, under current law, to prove your innocence in court – even when your trial was tainted by serious constitutional violations, and even when you have DNA test results on your side. The barriers that now exist to proving and getting a conviction overturned based on actual innocence make it clear that we need to bring more – not less – judicial scrutiny to such cases, and that the "escape hatch" the proposed bill purports to provide for innocent *habeas* petitioners will be useless to them in practice.

Brandon Moon, who traveled from his home in Kansas City, Missouri, to be here today, is one such case. Brandon was an Army veteran and a promising college student with no criminal record when he was misidentified by a rape victim in El Paso, Texas in 1987, and convicted by a jury of that brutal crime. He spent 17 years in Texas' harshest prisons -- and had to serve as his own lawyer for fifteen of those years -- before he was exonerated and freed by DNA evidence seven months ago. Brandon had begged his court-appointed lawyer to investigate the newly-emerging science of DNA technology before trial, and to hire an independent expert to review the state's dubious serology evidence against him, but the lawyer failed to do either. Brandon then managed to secure a court order for rudimentary DNA analysis one year after his conviction, and the preliminary results appeared to exclude him as the source of the rapist's semen. But he had no funds to complete the testing; to have experts review the results; or to hire another

lawyer to get the job done. He thus spent the next fifteen years filing habeas petitions *pro se*, imploring both state and federal courts to examine his DNA tests and order more of them, and to review serious constitutional errors from his original trial. Lacking competent counsel to assist him, Brandon quite understandably found it difficult to navigate these treacherous procedural waters, and indeed, his 1992 "mixed" federal habeas petition was dismissed for failure to exhaust all of his claims.[11]

Although those claims were soon denied by state and federal courts – both on their merits and on procedural grounds -- over a decade later Brandon managed to find experienced *pro bono* counsel, who was at last able to retain experts and investigators to complete the DNA testing that proved his innocence beyond any doubt.[12] It was also revealed that the serologist from the state crime lab who testified against Brandon at trial had, in fact, made serious and fundamental errors, *and* that the state had been notified of those errors by one of its own experts in the mid-1990s, but did nothing in response.[13] On the day of Brandon's exoneration, the El Paso District Attorney honorably apologized to him in open court for the 17-year ordeal he had endured. Anyone present on that day would have found it hard to believe that this was the same Brandon Moon who had been repeatedly cited for "abuse of the writ" by that office during the preceding decade, and

[11] *See Moon v. Collins*, No. EP-92-CA-364-H (W.D. Tex.) (Order of Dismissal dated Sept. 20, 1993).

[12] *See* Charles K. Wilson, "17-year Ordeal Finally Ends for Freed El Pasoan's Family," EL PASO TIMES, December 22, 2004; Barbara Novovitch, "Free After 17 Years for a Rape That He Did Not Commit," THE NEW YORK TIMES, December 22, 2004. *See also Ex Parte Brandon Lee Moon*, Case Nos. AP-75, 131 and AP-75-132 (Tex. Ct. Crim. App. April 2, 2005) (affirming grant of writ of habeas corpus, on grounds of actual innocence, following joint motion for relief by Petitioner and State).

[13] *See* Tammy Fonce-Olivas, "DPS Knew for 8 Years Conviction of Moon Dubious," EL PASO TIMES, May 7, 2005.

whose DNA testing claim was called "patently frivolous" by the federal courts in 1998.[14] *Even more sobering, because the conclusive DNA evidence that exonerated Brandon could -- in theory -- have been developed by him or by competent counsel before that time, no federal court would have the power to even consider that new evidence of innocence if the provisions of this bill were the law of the land.*

I am also joined today by Darryl Hunt of North Carolina, who last year emerged victorious after a twenty-year struggle to prove his innocence of the rape/murder for which he was wrongfully convicted and faced the death penalty in 1984. Darryl is here today as a free man – and the real perpetrator of the crime, Willard Brown, has confessed and is behind bars for life – thanks to state-of-the-art DNA evidence and the tireless advocacy of a team of post-conviction attorneys and investigators. But the gates to freedom did not open magically or instantly once DNA ruled Darryl out as the man whose semen was found in the victim's corpse – far from it. For years, Darryl's lawyers were repeatedly thwarted in their efforts to have his conviction vacated based on these DNA results, during a decade of litigation. The federal courts who heard his case not only twisted themselves into knots to explain away the DNA evidence and deny his actual innocence claims, but also failed to give him a hearing or any discovery on his due process/*Brady* claims before rejecting them -- including his assertions that the state had withheld material evidence pointing to the real perpetrator. [15]

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[14] *See Moon v. Johnson*, No. EP-97-CA-74-H (Report and Recommendation of Federal Magistrate Judge Richard P. Mesa, May 12, 1998). The Report and Recommendation was adopted by the United States District Court on March 29, 1999.

[15] In November 1994, Hunt's first motion for a new trial was denied, even though the results of the first DNA tests showed that Hunt's DNA did not match the semen found on the victim, and his alleged "accomplices" also were not DNA matches for the semen. The court order ruled that the newly discovered evidence still did not eliminate Hunt as the killer or as a participant in the rape. Leigh A. Dwyer, "Hunt denied a new trial: New slant: DA says case is now stronger," WINSTON-SALEM JOURNAL, November 11,

It is only because Darryl's legal team never gave up -- and eventually secured a new round of DNA testing, whose results were entered into the national DNA databank and pegged Willard Brown as the rapist-murderer -- that this litigation came to its rightful end at long last. And it bears emphasizing that Darryl was not the only individual who suffered great harm as a result of the courts' two-decade-long failure to take his actual innocence claims seriously; crime victims did, too. For while this innocent man was behind bars, Willard Brown committed what officials now admit were at least two other violent rapes, and possibly more. Tellingly, however, it was not until *after* Brown's arrest in December 2003 that additional *Brady* material – showing that the State had critical inside information pointing to Brown all along – was finally turned over to Darryl Hunt's lawyers.[16]

And it is not just those exonerated by DNA evidence who can attest to the long, hard road that federal habeas law already imposes on the innocent. Last month, thanks to over fifteen years of investigation by Centurion Ministries and the *pro bono* legal services of attorney John Zwerling of Wilmer, Cutler, Pickering, Hale & Dorr, Joseph Wayne Eastridge and Joseph Sousa won an order from a federal district judge vacating their 29-year-old murder convictions – but just barely. In a 59 page decision, the Court found that numerous pieces of credible evidence established the men's actual innocence,

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1994. The federal courts continued to employ this same tortured logic for years to explain away the DNA results. *See Hunt v. McDade,* 205 F.3d 1333, at *2-*3 (4th Cir. 2000). Ironically, the Fourth Circuit's opinion denying Daryl Hunt's actual innocence claim was joined by the Hon. Michael Luttig, who two years later would write the first circuit court opinion recognizing a federal constitutional right of access to DNA evidence that can prove innocence. *See Harvey v. Horan,* 285 F.3d 298, 305-26 (4th Cir. 2002) (en banc) (Luttig, J., concurring).

[16] The withheld *Brady* material included a police report on a 1985 rape, which occurred blocks away from the Sykes rape/murder, showing that Brown was identified as the culprit from an in-person lineup. *See* Phoebe Zerwick, "For 18 years, groping for truth," WINSTON-SALEM JOURNAL, Jan. 4, 2004; Phoebe Zerwick, "Attacks were similar," WINSTON-SALEM JOURNAL, Feb. 8, 2004.

such that "no reasonable juror" would likely have convicted them of murder. But even that finding was insufficient to overturn their convictions on its own under current law; it was only enough to pry open the doors to relief based on other constitutional claims of merit, claims that would otherwise have been procedurally barred.[17] Yet it is almost certain that *none* of those claims, including innocence, would even be given a hearing under the radical curtailing of the Writ now proposed.

Make no mistake: there is a way to "streamline" the claims of the actually innocent, but it is not to be found in this bill. If Brandon Moon had competent post-conviction counsel provided to him in the early 1990s, rather than fighting a lonely and largely fruitless battle *pro se*, I have no doubt he would now be celebrating his second decade as a free man, instead of his first few months. If Darryl Hunt had been given a prompt, full and fair hearing on his *Brady* and actual innocence claims – complete with meaningful, court-supervised discovery and full compliance by the state – I have no doubt that conclusive proof of his innocence *and* the true perpetrator's identity would have emerged years earlier. And if the courts had not spent fifteen years untangling Joseph Eastridge's claim of innocence from the procedural hurdles he found erected at nearly every turn, his co-defendant Michael Diamen, who died before the Court ruled in their favor this year, might have lived to see his name cleared. But the proposed bill turns the lesson of these cases on its head. It threatens to make what is already a tortuous, difficult mountain for the wrongfully convicted to climb into a wholly impenetrable steel wall. Instead of racing to erect such a wall in front of the federal courthouse doors,

[17] *See Eastridge et. al. v. United States,* Civil Action No. 00-3045 (Dist. Col. May 26, 2005). The court discussed the powerful evidence of the defendant's innocence in great detail, but under current law, was only able to use that evidence to open a procedural "gateway" to otherwise-barred procedural due process claims, upon which relief could be granted. *See id.* at 50-51.

shouldn't we be asking what we can do to better ensure that the wrongfully convicted get their day in court?

III. *House v. Bell* – One Step Forward, or Ten Steps Back?

Ironically, the proposed radical curtailment of innocent prisoners' access to the courts is racing ahead just as the U.S. Supreme Court is poised to clarify and strengthen this area of law. Two weeks ago, the Court announced that this fall, it will hear the case of Paul House, a Tennessee death row inmate who has presented the federal courts with powerful new evidence of his actual innocence. That evidence includes, among other things, DNA testing that directly rebuts the key forensic testimony offered against Mr. House at trial, as well as multiple, credible confessions to the murder by the real perpetrator; indeed, it is so strong that six judges of the *en banc* Sixth Circuit are convinced that it establishes Mr. House's actual innocence beyond any doubt and would set him free without delay.[18] Yet none of those key facts were developed, or even cursorily investigated, by the court-appointed attorney who represented Mr. House in his state post-conviction proceedings,[19] leading the barest possible majority of the 6th Circuit to bar review of his serious constitutional claims.[20]

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[18] *See House v. Bell*, 386 F.3d 668 (6th Cir. 2004) (en banc).

[19] Indeed, Mr. House's court-appointed state postconviction counsel admitted that he not only failed to do any investigation whatsoever into *any* of his client's consistent and longstanding claims of innocence, or into any other constitutional violations. He also knowingly and explicitly waived those claims in state court, over his client's objection, proceeding solely on a flimsy jury-instruction claim; Mr House, facing execution and without anyone to champion his innocence, had even filed a *pro se* petition in a desperate effort to preserve those claims, but the lawyer's waiver acted to nullify them, too. When Mr. House finally was appointed competent, diligent counsel to bring his federal habeas, the state lawyer's ineffectiveness worked as a procedural bar to the veritable "gold mine" of innocence facts that his federal lawyer had uncovered. And surely, then, if S.1088 were to become law, the State will argue that this history bars Mr. House from any federal review of his innocence claims and will require dismissal of the entire petition.

[20] The 6th Circuit split 8-7 in ruling against House, with six judges in the minority finding that he had unequivocally established his "actual innocence," and a seventh finding that the case posed a "real-life murder mystery, an authentic 'who-done-it'" that at the very least merited a new trial by jury. *See id. at*

House v. Bell will be the first time the Supreme Court has tackled an actual innocence case in over a decade, and much about our justice system – including the remarkable uses of DNA technology to prove innocence and expose scientific errors at trial – has changed since then. We hope and expect the Court will take this opportunity to clarify a number of key issues that have confused the circuits and harmed the innocent in recent years. These include what constitutes a cognizable "actual innocence" claim under our federal Constitution; what lesser, but still substantial, showing of innocence is enough to merit a hearing on other constitutional claims; and how new scientific evidence (*i.e.*, proof that the jury based its verdict on "false facts") should weigh in the balance.[21] There is every reason to hope that the Court will draw upon the sobering lessons we have learned from DNA and other exonerations, and make it easier – and faster – for the truly innocent to have their claims heard on the merits. Surely, this body should not rush to usurp the Supreme Court's authority and expertise in that regard. Our Constitution, and the innocent persons for whom it provides the final safeguard against wrongful execution and imprisonment, deserve no less.

CONCLUSION

The radical changes in law proposed by S. 1088 will dramatically increase the risk that innocent people will be executed or imprisoned for crimes they did not commit, and that the true perpetrators of those crimes will never be brought to justice. This Committee should scrutinize and reject -- not rush to pass -- this ill-conceived legislation.

719. The majority, despite finding that House had made out a "colorable claim of actual innocence," denied relief on procedural grounds and would have allowed his execution to proceed. *Id.* at 684.

[21] The Innocence Project filed an *amicus curiae* brief in support of Mr. House's petition for certiorari raising these and other issues for the Court's consideration. *See House v. Bell,* No. 04-8990 (brief of the Innocence Project, Inc.), available at www.supremecourtus.gov.

STATEMENT BEFORE THE

UNITED STATES SENATE JUDICIARY COMMITTEE

July 13, 2005

BRYAN A. STEVENSON

Equal Justice Initiative of Alabama, Director
NYU School of Law, Professor of Clinical Law

Fairness, Reliability and Federal Habeas Corpus Procedures

Honorable Members of the United States Senate Judiciary Committee:

I'm pleased to appear before this committee to discuss the importance of fair and reliable administration of criminal justice and the crucial role of federal habeas corpus in the American system. There has been a tremendous increase in the number of American citizens being sent to jail or prison in the last 30 years. In 1972, there were 200,000 people in jails and prisons; today there are over 2.1 million people incarcerated.[1] During this same time period, thousands of people have been sentenced to death in America. Some three and a half thousand people currently face execution and close to a thousand prisoners have already been executed.[2]

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[1] Bureau of Justice, Prison Statistics, http://www.ojp.usdoj.gov/bjs/prisons.htm.

[2] Death Penalty Information Center, Executions By Year, http://www.deathpenaltyinfo.org/article.php?scid=8&did=146.

The large number of incarcerated people and criminal prosecutions threatening long-term confinement or death has overwhelmed many state criminal justice systems. Many states have been unable to fund adequate indigent defense systems or provide resources for sufficient oversight, training and management of cases to ensure fair, constitutional and reliable convictions and sentences. In my state of Alabama we have no public defender system. With the exception of a few counties, indigent defendants in Alabama receive appointed lawyers from the private bar. The total compensation a lawyer may receive is limited by statute to $1500 to $3500 per case.[3] This includes serious cases where the accused faces life imprisonment. There have even been caps on compensation in death penalty cases. Of the 190 people currently on Alabama's death row, 72% percent were represented by appointed lawyers whose compensation for preparing the case was capped at $1000 by state statute.[4]

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[3] *See* ALA. CODE § 15-12-21 (d) (1-6) (1975).

[4] *See* ALA. CODE § 15-12-21(d) (1996). On June 10, 1999, compensation for appointed attorneys was increased to $50 per hour for in-court work and $30 per hour for out-of-court work. The 1999 amendment removed the cap for in-court work in capital cases but fees for out-of-court work remained capped at $1000. Effective October 1, 2000, compensation for appointed attorneys increased to $60 per hour for in-court work and $40 per hour for out-of-court work and the $1000 cap on out-of-court fees in capital cases was eliminated. ALA. CODE § 15-12-21(d) (2002).

There are hundreds of people on death row in Texas who were defended by attorneys who had investigative and expert expenses capped at $500.[5] In some rural areas in Texas, lawyers have received no more than $800 to handle a capital case.[6] A study in Virginia found that, after taking into account an attorney's overhead expenses, the effective hourly rate paid to counsel representing a capital defendant was $13.[7] In non-

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[5] Until 1995, Texas, which has one of the largest death row populations in the United States, capped the entire amount defense counsel could request for investigative and expert expenses at $500. *Lackey v. State*, 638 S.W.2d 439, 441 (Tex. Crim. App. 1982 (discussing Tex. Code Crim. Proc. art. 26.05 (1980)); *see also* Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 77-98 (2000) http://www.texasdefender.org/state%20of%20denial/Chap6.pdf.

[6] *See* Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 799 (citing Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, Nat'l L.J., June 11, 1990, at 34).

[7] *See* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to*

capital cases, courts have upheld rates as low as $845 for representation of an accused facing life in prison and $318 for people facing less than 20 years in prison.[8] Similar restrictions can be found in many states, especially in states where the death penalty is frequently imposed.[9]

Render the Ineffective Assistance of Counsel, 68 IND. L.J. 363, 366 (1993).

[8] *See* VA. CODE ANN. 19.2-163 (Michie Supp. 1999).

[9] For example, until 2003 in Mississippi, counsel appointed to represent an indigent defendant faced a $1,000 cap on compensation. In a capital case, two attorneys could be appointed for total compensation not to exceed $2000. MISS. CODE ANN. § 99-15-17 (2003). Similarly, there are death row inmates in Kentucky who were represented by appointed counsel who faced a $2500 cap on compensation. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835, 1853 (1994) (citing The Governor's Task Force on the Delivery and Funding of Quality Public Defender Service Interim Recommendations, reprinted in THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Dec. 1993, at 11).

In Pennsylvania there are death row prisoners who were sentenced to death in Philadelphia in the 1980's and 1990's when 80% of the capital cases were handled by appointed lawyers who received a flat fee of $1700 plus $400 for each day in court.[10]

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[10] *See* Tina Rosenberg, *Deadliest D.A.*, N.Y. TIMES, July 16, 1995 at 22(Magazine). Philadelphia represents less than 13% of Pennsylvania's population but over half of the State's death row population. *See* John M. Baer, *Faulkner, Mumia in Mix: State Senate Hearing Set on Moraorium for Death Penalty*, PHILA. DAILY NEWS, Feb. 21, 2000, at 7 (noting that Philadelphia is responsible for 55% (126/230) of state's death row population; 88% (111/126) of inmates put on death row by the Philadelphia district attorney are African American or Latino).

Underfunded indigent defense has predictably caused flawed representation in many cases with corresponding doubts about the reliability and fairness of the verdict and sentence. Even in capital cases, indigent accused facing execution have been represented by sleeping attorneys,[11] drunk attorneys,[12] attorneys almost completely unfamiliar with trial advocacy, criminal defense generally, or the death penalty law and procedure in particular,[13] and attorneys who otherwise cannot provide the assurance of reliability or fairness in their client's conviction and death sentence.

While small steps have been made to confront the problems of inadequate funding for indigent defense at trial, the reality is that there are thousands of people who have been

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[11] *See, e.g., Ex parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005) (upholding death sentence where lead attorney slept through major portions of trial); *Ex parte Burdine*, 901 S.W.2d 456, 457 (Tex. Crim. App. 1995) (Maloney, J., dissenting) (denying death row prisoner's application for postconviction relief where lead trial attorney slept during trial); *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001); *see also* Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 89-95(2000) http://www.texasdefender.org/state%20of%20denial/Chap 6.pdf (discussing capital cases in which counsel slept through trial and the defendant was sentenced to death).

[12] *See, e.g., Guy v. Cockrell*, 2002 WL 32785533 at *4 (5th Cir. July 23, 2002) (trial counsel conceded using cocaine during capital trial); *Haney v. State*, 603 So. 2d 368, 377-78 (Ala. Crim. App. 1991) (affirming death sentence even though trial had to be suspended for a day because the lawyer appointed to defend her was too drunk to go forward); *see also* Texas Defender Service, LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS 38-39 (2002), http://www.texasdefender.org/chapters.pdf.

[13] *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2104-2109 n.175-190 (2000) (discussing numerous examples of incompetent lawyers appointed to handle capital cases and studies documenting the inexperience and incompetence of attorneys appointed to represent capital defendants in most death penalty states); Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 79-98 (2000) (discussing examples of incompetent, unqualified, or unethical attorneys appointed to represent capital defendants) http://www.texasdefender.org/state%20of%20denial/Chap6.pdf.

wrongly convicted and sentenced as a result of unreliable and underfunded legal assistance. There are obviously other problems contributing to wrongful convictions but it is clear that it is only through postconviction proceedings and federal habeas corpus review in particular that we can protect many innocent people and others who have been illegally and unfairly convicted and sentenced.

State Postconviction is Not Reliable in Many States

Deficiencies in state systems result in wrongful convictions and unreliable verdicts and sentences that must be corrected and addressed in postconviction proceedings. However, state postconviction in many states is simply non-responsive to these problems and even less reliable than the state trial process. My state does nothing to provide death row prisoners, or any other incarcerated person, counsel for postconviction review. If a condemned prisoner can get a petition timely filed within the statute of limitations, the court has the discretion to appoint a lawyer but the lawyer's compensation is limited to $1000 for the entire case.[14] Lawyers do not want, and generally will not accept, those appointments.

[14] Alabama law limits compensation to appointed counsel in State postconviction cases to $1000 per case. ALA. CODE § 15-12-23 (1975) (as amended by Act 99-427 (1999)).

Despite the fact that Alabama now has the fastest-growing death row population in the United States,[15] it has no postconviction public defender office. Alabama appoints no lawyers to represent death-sentenced inmates at the conclusion of an unsuccessful direct appeal. It furnishes no paralegal or other aid at the prisons to enable death-sentenced inmates to collect the factual information and draft the pleadings necessary to obtain judicial consideration of constitutional claims based on facts outside the trial record. It maintains no central agency to monitor the progress of capital postconviction cases, assist in recruiting volunteer counsel, or give volunteer counsel needed technical support. More than fifty death cases are currently pending in state postconviction proceedings in Alabama, but the State did not assist the inmates in any of these cases to obtain timely, effective assistance of counsel or any other kind of legal aid.

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[15] The death sentencing rate in Alabama is three to ten times greater than that in other Southern states. *See* U.S. Census Bureau, *State Population Estimates and Demographic Components of Population Change: July 1, 1998 to July 1, 1999*, http://www.census.gov/population/estimates/state/st-99-1.txt.

Alabama's failure to provide any legal assistance to death-row inmates forces those inmates who cannot find volunteer lawyers to file state postconviction petitions *pro se*. Inadequate legal assistance is especially problematic because the Alabama postconviction process, which is governed by Rule 32 of the Alabama Rules of Criminal Procedure, is marked by strict pleading requirements, inflexible filing deadlines, elaborate preclusion doctrines, and other technical pitfalls that cannot practicably be navigated without highly-skilled counsel.[16] The Alabama Attorney General's Office routinely moves to dismiss claims in petitions filed by death-row prisoners on procedural grounds such as lack of specificity, lack of factual development and failure to comply with complex procedural rules that are not well understood. Lacking the ability to interview witnesses, gather records, or investigate factual questions before filing – let alone the legal skill to understand what form of allegations will make a pleading "sufficiently specific" to satisfy Rule 32.6(b) [requiring "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds"] – prisoners without skilled counsel are at risk of summary dismissal.[17]

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[16] In the last few years, at least seven Alabama death-row prisoners have had to navigate state postconviction proceedings without the assistance of volunteer counsel. ***All*** of these prisoners either have had their cases dismissed or have been otherwise precluded from state-court review as a result of their inability to obtain adequate legal assistance. For example, Christopher Barbour was forced to file a State postconviction petition *pro se* on March 4, 1997. The judge then appointed counsel, who represented Mr. Barbour at an evidentiary hearing on March 18, 1998. Appointed counsel did not file a post-hearing brief or proposed order and never filed a notice of appeal after Mr. Barbour's petition was denied on April 21, 1998. The State did not provide counsel for an appeal, and Mr. Barbour therefore lost his state postconviction claims by default. The Alabama Supreme Court ordered his execution on May 25, 2001. *Barbour v. Haley*, 145 F. Supp. 2d 1280, 1282 (M.D. Ala. 2001). Just two days before this date, volunteer counsel obtained a stay from the United States District Court for the Middle District of Alabama. *Id.*

[17] Unrepresented condemned inmates may also fall afoul of other technical rules. An

example is the case of Joseph Smith. On September 27, 2002, Mr. Smith filed a *pro se* State postconviction petition in the Mobile County Circuit Court after he was unable to find volunteer counsel. The State moved to dismiss Mr. Smith's petition and sent a letter to the circuit judge asserting that it was unnecessary to appoint counsel for Mr. Smith: "Typically, the State would not file a motion to dismiss a Rule 32 petition when the petitioner is on death row until an attorney has been appointed. This case, however, is different because the statute of limitations has expired. While the State has no objection to the appointment of counsel for Smith, the appointment of counsel would not change to [sic] fact that Smith filed an untimely Rule 32 petition that is due to be summarily dismissed." State's Letter of Oct. 7, 2002, to Hon. James C. Wood, in *Smith v. State*, Mobile Co. Cir. Ct. No. CC-98-2064. Without appointing counsel, the circuit judge subsequently signed the State's proposed order dismissing Mr. Smith's *pro se* State postconviction petition as untimely. *Smith v. State*, order of Oct. 9, 2002.

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Moreover, death-row prisoners cannot typically obtain independent judicial fact-finding or decisionmaking in State postconviction proceedings without the assiduous efforts of competent and dedicated counsel. Many prisoners executed by Alabama have had constitutional claims that were barred from federal review because they could not obtain adequate legal assistance in state postconviction proceedings.[18]

Finding volunteer counsel for all death-row prisoners in Alabama has always been difficult. With the rapid growth of the death-row population and AEDPA's 1996 enactment of a 1-year statute of limitations for filing federal habeas corpus petitions (28 U.S.C. § 2244(d)(1)), it has become almost impossible.

S.B. 1088 Will Create More Unreliability and Delay and Should Be Rejected

Federal habeas corpus law has become an extremely complex and procedurally

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[18] An example is Jerry Henderson's case. After volunteer counsel filed Mr. Henderson's State postconviction petition, the lawyer withdrew from the case. The circuit court then appointed counsel who subsequently became the Talladega County District Attorney. The Alabama Legal Directory 446 (2003). Appointed counsel facilitated the circuit court's dismissal of Mr. Henderson's State postconviction petition, effectively foreclosing Mr. Henderson's opportunity for review. The state appellate courts upheld the dismissal of Mr. Henderson's petition. *Henderson v. State*, 733 So. 2d 484, 485 (Ala. Crim. App. 1998), *cert. quashed, Ex parte Henderson*, Ala. S.C. No. 1980085 (April 23, 1999). *See also, Baldwin v. Johnson*, 152 F.3d 1304, 1318-19 (11th Cir. 1998); *Waldrop v. Jones*, 77 F.3d 1308, 1314-1316 (11th Cir. 1996); *Weeks v. Jones*, 26 F.3d 1030, 1042-1046 (11th Cir. 1994).

demanding area. While review of substantive constitutional issues can sometimes be challenging for state and federal judges to resolve, there is no question that practitioners, judges, law clerks and reviewing courts spend most of their time trying to untangle complex procedural issues, rules and concepts in habeas corpus litigation. Years of litigation are devoted to a variety of procedural questions that dominate case opinions and the litigation process. S.B. 1088, the "Streamlined Procedures Act" (SPA), will unnecessarily add to this complexity and ironically create dozens of procedural questions that may delay cases for years just as many aspects of the AEDPA are now becoming clear after its passage in 1996.

More importantly, S.B. 1088 will result in less reliable, fair and accurate administration of criminal justice. This is especially true in death penalty cases where the legislation will unacceptably increase the risk of executing the wrongly convicted and innocent. An examination of various aspects of the Act make it clear that this bill will undermine fair and reliable administration of criminal justice and contribute to delay and time-consuming litigation.

Section 2 – Exhaustion

Under current law there are stringent and clear requirements for "exhaustion" of claims that require a petitioner to present all legal theories, material facts and arguments to state courts before seeking redress in federal court. When state court process is unavailable or otherwise denied a prisoner, exhaustion rules permit federal review. This is a crucial protection.

Anthony Ray Hinton is an innocent death row inmate who has spent 19 years on Alabama's death row for crimes he did not commit. His case has been pending at the state

postconviction trial court for 15 years. He has had no federal habeas corpus review. At trial the State conceded that there is no connection between Mr. Hinton and the murders he is accused of other than a weapon match between recovered bullets and a gun belonging to Mr. Hinton's mother.[19] The State has repeatedly acknowledged that without a weapon match, Mr. Hinton should be released.[20]

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[19] Trial Transcript, *Hinton v. State,* No. CC-85-3363,3364 (Jefferson Co. Cir. Ct.) at R. 33-34, 423-24, 836, 1724.

[20] Trial Transcript, *Hinton v. State,* No. CC-85-3363,3364 (Jefferson Co. Cir. Ct.), at R. 827-28, 836.

At a state postconviction hearing in 2002, three of the country's best toolmark examiners and firearm identification experts testified that the recovered crime bullets from this case cannot be linked to the gun recovered from Mr. Hinton's mother. They further concluded that the Hinton weapon was mechanically incapable of producing some of the recovered crime bullets. This unrebutted new evidence exonerates Mr. Hinton and mandates his release.[21] Yet, exhaustion rules require him to languish on death row.

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[21] At trial, two Alabama Department of Forensic Science ("DFS") witnesses wrongly concluded that bullets recovered from three crimes could be linked to a single weapon and that the weapon was found in the home of Mr. Hinton's mother. The State withheld DFS reports which made clear that the DFS witnesses could not reliably match the recovered bullets in this case to a single weapon or to Mr. Hinton. The suppressed evidence would have clearly impeached the DFS witnesses and prevented a wrongful conviction. Postconviction Transcript, *Hinton v. State,* No. CC-85-3363.60, 3364.60 (Jefferson Co. Cir. Ct.), at PC. 2485-90.

Mr. Hinton, who was twenty-nine years old and had no history of violent crime at the time of his arrest, steadfastly maintained his innocence. Prior to trial, he passed a polygraph test given by police, which exonerated him of any involvement in these crimes. The trial judge refused to admit it into evidence. Trial Transcript, *Hinton v. State,* No. CC-85-3363, 3364 (Jefferson Co. Cir. Ct.), at R. 2025-28, 2150-53. He also presented evidence that he was working in a secure facility **fifteen miles from the crime scene when the crime took place** at 12:14 a.m. His supervisor and other employees confirmed

We have begged state courts to rule in Mr. Hinton's case for the last three years and anticipate that federal habeas corpus review of his unexhausted claims may be required. This bill would preclude such review and extend the wrongful imprisonment and condemnation of Mr. Hinton.

Anthony Tyson is a death row prisoner in Alabama who like many death row prisoners in Alabama could not find a lawyer for state court litigation before his federal statute of limitations was about to expire. He filed a *pro se* petition in May of 2002 and asked the state court to appoint him an attorney. The state court judge did nothing for eleven months. Relying on language in the AEDPA that this bill would eliminate, Mr. Tyson then filed a federal habeas corpus petition claiming that his issues could not be exhausted because of the state court's refusal to appoint counsel and state inaction. It was only when a federal appeals court was prepared to review Mr. Tyson's case that state prosecutors forced the state court judge to take action and facilitate review of Mr. Tyson's case.

Ths SPA would trap many wrongly convicted and innocent people in state court litigation indefinitely with no mechanism for permitting federal court review of clear violations of constitutional rights. Moreover, by adding to the pleading requirements imposed on state court prisoners, section 2 of the SPA will cause more procedural defaults and unfairly bar prisoners without counsel or adequate representation from ever receiving

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that Mr. Hinton arrived at work at 11:57 p.m. on the night of the Smotherman offense, clocked in at 12:00 a.m., was given his work assignment at about 12:10 a.m., was checked on by his supervisor around 12:40 a.m., and was closely supervised during his six-hour shift. Id. at R. 1023, 1345, 1350, 1396, 1398.

review of their claims.

Section 603 and 605 – Amended Petitions and Tolling of the Statute of Limitations

The combination of inadequate counsel in state court proceedings and the AEDPA's one-year statute of limitations means that many federal habeas corpus petitions have to be filed by recently appointed counsel who have no time to review the record or investigate the case before a petition must be docketed. Statutes of limitation frequently require rushed filings to beat a deadline that is often created by the failure of individual states to provide lawyers to prisoners at the completion of direct appeal.

In the last seven years, ninety-five indigent Alabama death-row inmates have filed state postconviction appeals. In ninety-four of these cases, the State made no lawyer available to the condemned inmate before the filing deadline expired. In some cases volunteers are found by our private, non-profit organization or through an American Bar Association project set up to help the poor. However, many death row prisoners cannot obtain volunteer assistance and are forced to file *pro se* petitions. [22]

Under 28 U.S.C. § 2244(d)(1) as enacted by the Antiterrorism and Effective Death Penalty Act of 1996, a federal habeas corpus petition must be filed within one year of the

[22] The one case in which an Alabama court did appoint a lawyer to represent a condemned inmate after the conclusion of direct appeal and before the filing of a timely State postconviction petition involved an inmate who had actively sought the death penalty at his original trial. *See* Penalty Phase Transcript, *Hutcherson v. State*, No. CC-92-2955 (Mobile Co. Cir. Ct.), at R. 500, 514, 541.

end of an inmate's direct-review proceedings. Since this one-year statute of limitations is tolled during the pendency of State postconviction proceedings -- but only for the period between the filing of a State postconviction petition and its final disposition -- the federal statute creates a *de facto* outside deadline of one year; and the federal statute also puts a condemned inmate at grave risk of losing any opportunity for federal habeas corpus review unless the State postconviction petition is filed long enough *before* the one-year deadline so that there will be time, if and after State postconviction relief is denied, for the inmate to learn about the denial, prepare a federal habeas corpus petition, and get it filed in federal court, *still* within one year. Wrongly convicted prisoners for whom volunteer counsel can be recruited only after a large part of their one-year federal statute-of-limitations period has elapsed are caught between the dangers of rushed filing of an inadequately developed State postconviction petition and the risks of leaving so little time remaining in their federal limitations period that a moment's inadvertence or absence on the part of counsel at the exact time of denial of State postconviction relief will literally kill the prisoner, with no chance of federal habeas corpus review.

Under current conditions in Alabama, because of the State's failure to provide condemned inmates with any sort of legal assistance in preparing State postconviction petitions, most such inmates are in fact forced to suffer *both* the harm of rushed drafting of their State postconviction petitions *and* the peril of losing federal habeas corpus review through any minor mishap after the conclusion of the State postconviction proceeding. Available data on the latest cohort of death-row inmates who filed State postconviction petitions prior to 2002 shows that in twenty-one cases the inmates have less than a week

remaining before their federal limitations period expires, and ten of the inmates have less than two days.

Section 605 of the SPA contemplates shortening the statute of limitations for short time periods while the appeal of state court judgments is being prepared. This would contribute nothing to the postconviction process apart from more traps for unsuspecting lawyers and *pro se* litigants. It would also undermine state court review of issues by forcing prisoners to file pleadings that are not crafted to facilitate appropriate, timely state court review but instead are governed by federal rules that effectively alter state court procedures and timelines.

SPA's restrictions on amendments to federal habeas corpus petitions are similarly misguided. In the 1990's, I represented George Daniel, a man who led a hard-working, law-abiding life until a car accident caused brain damage that went untreated. He became psychotic and delusional. After a couple of weeks he abruptly left his family and boarded a bus to Alabama. He arrived in a strange town and after wandering the streets for a couple of days and engaging in bizarre behavior, he got into a scuffle with a police officer and shot the officer with the officer's gun. Mr. Daniel's lawyers told the court that he was "crazy," irrational, and not competent to stand trial. He could not recognize family members, was eating his own excrement in the jail and was completely incapable of assisting in his defense. He was nevertheless convicted of capital murder and sentenced to death. At his sentencing hearing, the state called an "expert" from the state mental hospital who purported to be a clinical psychologist. That man testified that Mr. Daniel was not mentally impaired, but rather, was merely malingering.

Mr. Daniel exhausted his state court remedies with an attorney who could not

investigate the case. He was scheduled for execution and received a stay after filing a federal habeas corpus petition. Months later it was discovered that the "expert" who testified against him was a fraud – a high school dropout with no college degree, training or credentials who had been masquerading as a clinical psychologist for years. Mr. Daniel's petition was amended months after it was filed and relief that would not be available if this bill became law was granted. So compelling was the claim that Judge Ed Carnes of the Eleventh Circuit Court of Appeals, who then headed the Alabama Attorney General's capital litigation division, chose not to appeal the court's grant of relief.[23]

The ability to amend a petition is something that should be left to the sound discretion of federal judges and appealed by either party when that discretion is abused. It should not be abolished so that condemned prisoners like George Daniel can have their constitutional rights violated with no recourse for relief.

Section 604 – Procedurally Barred Claims

Perhaps no section of this bill would create greater confusion, unfairness and unintended outcomes than the section that would shield wrongful convictions and unconstitutional conduct by allowing state courts to simply assert that the claims are procedurally barred.

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[23] *Daniel v. Thigpen*, 742 F. Supp. (M.D. Ala. 1990).

As a practical matter, in many states there is no independent review of constitutional claims. Rulings in state postconviction proceedings are prepared by the prosecutor and simply signed by the judge wholesale without any changes. In Alabama, the state with the highest number of death row prisoners per capita in the country and in Texas, which has the second largest death row population in the United States and by far the most executions in the modern era,[24] state court rulings that are written by prosecutors is the norm.

Circuit judges routinely abdicate their responsibility to be fair, independent, and impartial factfinders by simply adopting wholesale the detailed factfindings and legal judgments of the Attorney General's Office.[25]

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[24] Death Penalty Information Center, *Death Row Inmates by State*, http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#state.

[25] For example, the state postconviction trial court signed the state's proposed order in Anthony Hinton's case, even though Mr. Hinton's evidence of innocence was unrebutted by any state evidence or testimony. In fact, the State filed no legal response to Mr. Hinton's arguments after the evidentiary hearing. Instead, the State simply gave the judge a 144-page order to sign – or more precisely, a computer disk containing an order to be printed and signed. After waiting two and a half years, and after Mr. Hinton twice sought an immediate judgment from the court, the judge signed the State's order without making any changes.

The absence of any independent analysis or factfindings in state postconviction death penalty cases has become so widespread in Alabama that it is the exceptional case in which a condemned prisoner obtains any impartial or judicial determination of the issues and facts that govern whether he will live or die. While virtually every court that has addressed the issue has condemned this practice,[26] tolerance of this ongoing problem has deprived most Alabama death row prisoners of meaningful review of important constitutional issues and factual questions.

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[26] It has been said that judicial orders that are simply adoptions of the extensive fact-findings and legal arguments of one side in a case are "[not] worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 n.4 (1964) (quoting J. Skelly Wright, *The Nonjury Trial -- Preparing Findings of Facts, Conclusions of Law and Opinions, Seminars for Newly-Appointed United States District Judges*, at 166 (1963)); *see also Anderson v. Bessemer City*, 470 U.S. 564, 572-573 (1985); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184-185 (1944) (the adoption of "findings [proposed by one of the parties to the suit and adopted by the trial judge] leave much to be desired in light of the function of the trial court").

In fact, a review of published decisions suggests that in nearly every case reviewed by the Alabama Court of Criminal Appeals in the last five years, the order dismissing or denying the petitioner's State postconviction petition was prepared by the State and adopted verbatim or almost verbatim by the trial court.[27] Similarly, in Texas, in 180 (88%) of the 204 state habeas corpus proceedings in which the state and trial court findings of fact and the Court of Criminal Appeals order were available, the Court of Criminal Appeals adopted findings that were exactly or virtually identical to the proposed findings issued by

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[27] *See, e.g., Wilson v. State*, CR-02-0394, 2005 WL 995418, at *2 (Ala. Crim. App. Apr. 29, 2005); *Duncan v. State*, CR-03-1634, 2005 WL 628215, at *5 (Ala. Crim. App. Mar. 18, 2005); *Taylor v. State*, CR-02-0706, 2004 WL 1909278 (Ala. Crim. App. Aug. 27, 2004); *Woods v. State*, CR-02-1959, 2004 WL 1909291 (Ala. Crim. App. Aug. 27, 2004); *Coral v. State*, CR-01-0341, 2004 WL 1178422, at *10-11 (Ala. Crim. App. May 28, 2004); *Giles v. State*, CR-00-0376, 2004 WL 925886, at *22 (Ala. Crim. App. Apr. 30, 2004); *Jenkins v. State*, CR-97-0864, 2004 WL 362360, at *40-41 (Ala. Crim. App. Feb. 27, 2004); *DeBruce v. State*, 890 So. 2d 1068, 1098-99 (Ala. Crim. App. 2003); *Slaton v. State*, CR-00-1952, 2003 WL 22220752, at *2 (Ala. Crim. App. Sept. 26, 2003).

the prosecutor.[28] These orders typically are over eighty pages long and contain detailed findings of fact and conclusions of law. Many were adopted over the petitioner's specific objection. Most were adopted verbatim. In some cases, the trial judge did not even remove the word "Proposed" from the title of the order and instead simply signed the exact order submitted by the State.[29]

The federal courts should not be forced to withdraw from the obligation to protect constitutional rights simply because the state asserts that a claim is procedurally barred. Many claims that are core to the integrity of the criminal justice system are frequently deemed procedurally barred. For example, claims of racial bias have frequently been deemed procedurally barred. In Alabama, we have won reversals in close to 25 death penalty cases after proving that prosecutors illegally excluded African Americans from jury service in violation of the Constitution. In many of these cases, the state courts had improperly asserted that claims of racial bias were procedurally barred.

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[28] TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS 54-55 (2002), http://www.texasdefender.org/chapters.pdf. A study of over 100 post-1995 state habeas proceedings found that in 83.7% of the case the trial court's findings were identical or virtually identical to those submitted by the prosecutor. *Id.* at 127 http://www.texasdefender.org/state%20of%20denial/Chap8.pdf.

[29] *See, e.g.*, Proposed Memorandum Opinion, *Hamm v. State*,No. CC-87-121.60 (Cullman Co. Cir. Ct., filed Dec. 3, 1999, signed Dec. 6, 1999).

When I was a young attorney at the Southern Center for Human Rights, our office represented Tony Amadeo in the United States Supreme Court. Mr. Amadeo's conviction and death sentence had been obtained after a Georgia prosecutor had prepared a memo detailing for the clerk how to exclude black people from jury service. The prosecutor instructed the clerk how to underrepresent racial minorities and shield this bigotry from legal challenge through manipulation of the data. When this was discovered by Mr. Amadeo's attorney after the trial, the claim was presented to state courts but the issue was deemed procedurally barred. In federal habeas corpus litigation, a unanimous United States Supreme Court reversed Mr. Amadeo's conviction. The Rehnquist Court concluded that the effort by county officials to conceal the prosecutor's rigging of the jury lists constituted "cause" for the procedural default and thus required federal review of the claim. Mr. Amadeo's conviction was reversed and he was retried by a properly selected jury and received a life sentence.[30] S.B. 1088 would shield this kind of racially discriminatory conduct from review.

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[30] *Amadeo v. Zant*, 486 U.S. 214 (1988).

James Cochran was convicted of capital murder and spent over 17 years on death row after a Birmingham prosecutor illegally excluded African Americans from jury service. Mr. Cochran's claim of racial bias was deemed procedurally barred by Alabama state courts even though Mr. Cochran had objected to the state's conduct. In federal habeas corpus litigation, the Eleventh Circuit ruled that Alabama's invocation of a procedural default rule was unfounded and a new trial was ordered.[31] Mr. Cochran was tried by a fairly selected jury and found not guilty. His exoneration simply would not have been possible under this proposed bill and intolerable racial bias along with a wrongful execution would have resulted.[32]

Section 606 – Harmless error in sentencing

Current habeas law requires federal courts to defer to state court findings of fact and legal conclusions, including findings of harmless error. Under current law, a federal court may not grant relief simply because the state-court's application of federal law was incorrect; rather, that application must also be "unreasonable." 28 U.S.C. § 2254(d)(1); *see*

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[31] *Cochran v. Herring*, 43 F.3d 1404 (11th Cir. 1995).

[32] The prosecutor at Jesse Morrison's capital trial also used peremptory strikes to exclude 20 of the 21 black people qualified for jury service. Again, the state courts improperly asserted that Mr. Morrison's claim of racial bias was procedurally barred when it was not. Mr. Morrison received federal habeas corpus relief after 19 years on death row and received a lessor sentence at his retrial. The state never appealed the federal judge's grant of relief. *Morrison v. Jones*, 952 F. Supp. 729 (M.D. Ala. 1996).

also Williams v. Taylor, 529 U.S. 362, 411-12 (2000).

SPA's section 6 would take away federal court jurisdiction to review constitutional errors in sentencing that the state court has deemed "harmless." Under this provision, federal courts would have no jurisdiction to review wrongful sentences. For example, federal courts could not review egregious prosecutorial misconduct if the misconduct affected a prisoner's *sentence*, rather than his conviction. For example, federal courts could not have reviewed the death sentence of Delma Banks who challenged his death sentence after learning that the prosecutor hid evidence that its central sentencing phase witness was paid for his role in setting Banks up.[33]

[33] *Banks v. Dretke*, 124 S. Ct. 1256 (2004).

Federal courts would have no jurisdiction to review the death sentence of prisoners whose counsel were grossly ineffective. Given the serious deficiencies that characterize legal assistance for many capital defendants, this would be grossly unfair. Federal courts would have no jurisdiction to review Terry Williams' death sentence. Mr. Williams' appointed counsel failed to prepare for sentencing until a week beforehand and failed to uncover extensive records documenting Mr. Williams' "nightmarish" childhood and mental impairments. The United States Supreme Court found that the Virginia Supreme Court's decision affirming Mr. Williams' death sentence was unreasonable because it relied on *inapplicable* Supreme Court precedent instead of the governing legal standards of *Strickland v. Washington*, 466 U.S. 668 (1984).[34] This critical federal oversight is essential if our system is going to be reliable, fair, and just.

Conclusion

There are other aspects of this bill that would undermine the reliability and fairness of criminal justice administration in this country that I don't address in these remarks but that present serious problems I hope this Committee will recognize.

Section 9 of the SPA intimates that courts can't objectively evaluate whether states meet the "opt-in" provisions detailed in the AEDPA because their dockets are implicated in the timelines created by opt-in status. The legislation attempts to resolve this by empowering the chief prosecutor in the United States, the Attorney General, to make these decisions. Giving federal prosecutors control over even part of the federal judiciary's docket and decisionmaking authority would have serious implications for the separation of

[34] *Williams v. Taylor*, 529 U.S. 362 (2000).

powers necessary for fair administration of criminal justice. Abolishing federal habeas corpus review for all constitutional issues except narrowly defined innocence claims would also pose very serious constitutional problems.

There is an understandable desire to have finality in all criminal cases. That finality should not come at the cost of fairness. We all have an interest in making sure that our system does not convict the innocent or wrongly punish the poor. Federal habeas corpus plays an import role in making sure that tragic errors in criminal cases are not insulated from correction required by the United States Constitution. That role should not be altered without care and a great deal of thought about the implications of restricting access to justice for some of our society's least protected.

I appreciate this Committee's time and attention to these very important matters.

Statement of John Pressley Todd
Assistant Attorney General
Arizona Attorney General's Office

United States Senate
Committee on the Judiciary

"Habeas Corpus Proceedings and Issues of
Actual Innocence"
July 13, 2005

For over thirty years, I have served as a prosecutor with the Arizona Attorney General's Office. I have spent about fifteen years investigating and trying street, white collar, and organized crime cases. The last fifteen-years I have litigated cases in the second stage of the criminal justice system, the post-judgment litigation that in death penalty cases will often span decades. This litigation involves the direct appeal, petition for certiorari to the U.S. Supreme Court, the state post-conviction relief proceedings, and federal habeas.

The Streamlined Procedures Act only affects one small part of this second stage of the criminal justice system, the narrow federal habeas review of state-court convictions for constitutional error. The Act will clear out the procedural undergrowth that fosters delay, while enabling the federal courts to consider cases where there exists a legitimate claim of factual innocence.

Before discussing the practical realities of habeas practice today and how the Act will affect it, I would like to briefly discuss: (1) the role of delay in the criminal justice system, and (2) how the Act fits into the entire criminal justice system. In my view, it is vital the Committee understands and considers the "big picture."

Delay only benefits one category of habeas petitioners. The guilty defendant convicted of murder and sentenced to death. Unlike the non-capital defendant who is serving his sentence during the habeas process and has every incentive to proceed as quickly as possible to have a federal court vindicate a constitutional claim that the state courts wrongly decided, the capital defendant is not serving his sentence–he is avoiding it. Every day of delay is another day in which the State is kept from enforcing its court judgment that is presumed valid. A judgment the state courts have determined conforms to the laws of that state and does not violate the United States Constitution.

Turning to the criminal justice system itself, we all agree that the primary purpose of the criminal justice system is to separate the innocent from the guilty. There are only two possible errors: (1) an innocent person is convicted, or (2) a guilty person goes free. Either error is an affront to society. At the stage of the system where the evidence is the most reliable, we balance the scales so that if there is an error, it is on the side of the guilty person going free.

Thus, we instruct jurors on the presumption of innocence and that the State must prove, beyond a reasonable doubt, each element of the crime charged. We provide counsel for those who cannot afford counsel.

The Supreme Court has called the trial the "main event." This normally occurs close in time to the crime, when memories are fresh. In Arizona, we studied our capital punishment cases from 1974 to 2000. The medium time between the time of the crime and imposition of sentence was 1.4 years. Nowhere else in the criminal justice system are events so fresh or the opportunity for uncovering evidence so great.

At the "main event," we ask our peers, jurors, to decide factual conflicts in the trial. In the entire criminal justice system, the trial is the only place where all the admissible evidence is considered and all the witnesses testify. It is there, only there, that credibility assessments of all the trial witnesses are made. It is there that jurors decide based on the admissible evidence the facts. Since 1215, English speaking people have relied on jurors to determine the facts.

An appellate court reviews the trial record to be sure that there is sufficient evidence from which jurors could find the defendant guilty beyond a reasonable doubt and that no legal or constitutional error occurred that would make the fact-finding process unreliable or unfair. Generally, if a defendant claims error, the state and federal courts require the defendant to have pointed out the alleged error to the trial judge, so that the judge has an opportunity to consider and to make any necessary correction. This is

known as the Contemporaneous Objection Doctrine. The Doctrine required because the trial court is in the best position to determine the effect of the alleged error on the fact-finding by the jurors.

Only rarely will a state or federal appellate court consider an alleged error that was not brought to the attention of the trial judge. The Contemporaneous Objection Doctrine requires attorneys to place the trial judge on notice and not to hold back the alleged error in case there is a conviction as insurance against a conviction. Without the doctrine, there would be an incentive to hold back a claim of error, as an "Ace in the Hole" for another court. As the Arizona Supreme Court expressed without this long-standing doctrine the justice system simply would not work. This is a fundamental principle of jurisprudence and extremely important in understanding the role of federal habeas.

If the state appellate court affirms the defendant's conviction and sentence, the defendant can petition the United States Supreme Court to review any constitutional claim of error.

The next step in the process is state post-conviction relief. This used to be a process only used if there were a real question of the trial attorney's effectiveness or truly newly discovered evidence. Since *Strickland v. Washington*, in a death case, new defense counsel routinely place the trial

attorney in a state post-conviction proceeding on trial for alleged errors of omission and commission. Fortunately, this proceeding normally is before the judge who presided at trial, relatively close in time to the trial, when the attorneys and witnesses are still available for testimony. According to Arizona's death penalty study the medium period was about 2 ½ years after the time of trial. In a death penalty case, whether there is any merit to the claims is immaterial, because the proceeding creates delay and expands the record of the state-court proceeding. The state post-conviction proceedings also allows for inclusion in the record information that has not been found reliable, admissible or subject to confrontation.

If the trial judge denies the defendant's post-conviction relief petition, he can seek review to a state appellate court. If that court denies relief, the defendant can raise any constitutional issue in a petition for certiorari to the United States Supreme Court.

In Arizona, a defendant can bring a new state post-conviction relief proceeding for certain claims at any time, such claims include newly discovered evidence, a change in the law, and evidence of actual innocence.

The Death Penalty Information Center's list of purportedly exonerated defendants is frequently cited as a reason for greater federal review. The Arizona experience demonstrates federal habeas review has played no role

in the Arizona cases. Additionally, there were two cases in which newly discovered DNA evidence actually exonerated the defendants. Neither person was on death row. Nevertheless, the state court procedures exonerated *Larry Youngblood* and Ray Krone. The reversals of the convictions for those individuals occurred at the state level, not in federal habeas. The claim that federal habeas review is necessary for defendants, who are actually innocent of their crimes, certainly is *not* supported by the Arizona experience.

The next routine step in the process for a capital defendant is federal habeas, for it guarantees significant delay regardless of the merits of any claim. The federal courts review is limited to being assured that the state court properly enforced the United States Constitution. Thus, the Supreme Court and Congress requires a state prisoner to have first presented his constitutional claim of error to the state court so that court has an opportunity to correct any Constitutional error, at a time much closer to the main event. Generally, the farther away from the main event, the trial, the less reliable is the available evidence. The chance of the error of letting a guilty person go free because the State no longer has the evidence with which to retry to the person, substantially increases. This is an affront on society in light of the jurors' verdict and certainly unjust for the victims.

Perhaps the only exception to the principle that evidence is less reliable overtime is an improvement in the forensic sciences, such as DNA. In Arizona, such evidence would be presented in state-court. No one wants a truly innocent person incarcerated or executed. Arizona and Streamlined Procedures Act, expressly allow for courts to consider this type of newly discovered *reliable* evidence.

Death cases languish in federal court for years. To some extent, this is understandable. By the time the cases reach a federal habeas, the record has increased multiple times and has become more complex, but often less reliable. Although it could and should be a relatively easy chore to determine what constitutional claims were presented in state court, under the existing law it is possible to parse theories and claims as well as add new claims so a simple task becomes difficult and time-consuming. In federal habeas, the district court judge then revisits the constitutional decisions made by all the preceding state-court judges. The district court judge's decision is appealed to the circuit court where additional years elapse, and certiorari is sought to the United States Supreme Court.

In a death case, one of the most popular areas of second-guessing is whether the defense attorney was constitutionally ineffective at sentencing for failure to do sufficient investigation into mitigation. It is a subjective

decision. However, this defendant's sentence *has nothing to do with the defendant's guilt or innocence.* It is an issue easily influenced by a judge's view of the death penalty, notwithstanding the law of the state.

At any of these proceedings, the process can began anew if a new trial or sentencing is ordered.

The final step in the post-judgment litigation is the clemency review. That review is a matter of executive grace unencumbered with procedural issues. The executive branch is free to grant clemency out of doubt or mercy.

The proposal before you will lessen the delay in the federal stage of the criminal justice system without precluding a truly innocent defendant from federal review. Overall, the basic proposition of the Streamlined Procedures Act appears to be that if reliable evidence demonstrates actual innocence, no federal court will be barred from reviewing the constitutional claim. Let me explain.

§ 2: Mixed Petitions.

This section clarifies the defendant's obligation to fairly present his federal claims by specifically arguing the basis for the claim. As the United States Supreme Court has stated, if a habeas petitioner wishes to claim a violation of federal law "he must say so, not only in federal court, but in

state court." *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (*per curiam*). "If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Id.* at 365.

Despite this decade-old decision, some federal courts believe "drive-by citations" to the Constitution in state-court briefs are fair presentation of a federal claim. Section 2 would require a defendant to identify where the right in the federal constitution is found and argue why it applies to his case, thus giving the State court an opportunity to correct a constitutional error shortly after the trial, not years later. Anything less is not fair to the state courts. Moreover, this is simply a form of the Contemporaneous Objection Doctrine that is essential to the operation of our justice system.

The section also clarifies that the state prisoner must tell the federal habeas court where in the state-court record he fairly presented his federal claim. This would eliminate the need for the State or the Court from searching the state court record to determine if the claim was in fact presented. Currently, in Arizona the federal court requires this sensible time-saving procedure.

The section provides an exception to the general rule for cases involving actual innocence. If a state prisoner meets the actual innocence test, then there is no need to have presented the constitutional claim in state court.

The section also states that claims that have not been presented to the state courts must be dismissed with prejudice. One tactic of delay, is to file a habeas petition, then ask the court to hold the petition in abeyance while the state prisoner returns to state court to present additional federal claims to the State court. Normally, most of the state prisoner's constitutional claims will have been presented in his direct appeal. The AEDPA one-year statute of limitations does not start to run until after the direct appeal becomes final. The statute of limitation is tolled while the prisoner is presenting his constitutional claims in his state post-conviction proceeding. The law should encourage litigants to bring all their claims at one time and not to hold back claims.

§ 3: Amendments to Petitions

This section makes the current AEDPA statute of limitations enforceable by eliminating the civil procedure rule concerning the "relate-back" doctrine. Because of concerns for the AEDPA statute of limitations, the Supreme Court in June restricted the "relate-back" doctrine somewhat in

Mayle v. Felix, once again overruling the Ninth Circuit. The Court acknowledged the vast difference between a normal civil case and a habeas case. However, in rendering its decision, the Court did not create a "clear-cut" rule, rather left factual issues to be resolve in each case. The effect is to create more litigation and more delay. This amendment would resolve that problem.

The AEDPA's statute of limitations provides adequate time to permit a diligent state prisoner to fairly present his constitutional claims to the state courts. The state prisoner should not be mislead into thinking that a federal judge might allow an amendment. This clear-cut rule provides clear notice and avoids the litigation the Supreme Court left to be settled in each individual case after *Felix*.

In an Arizona death case, the habeas court had proceeded to the point of a decision on the merits, when a new judge decided that new defense counsel should be allowed to go back and find additional claims. Years later, counsel finally filed an amended petition of legally meritless claims, most of which were unexhausted claims. The next briefing schedule could focus on whether there is cause and prejudice to allow consideration of the unexhausted claims. The courts resources are wasted, and the case is delayed.

There is an exception, again grounded in a showing of actual innocence or a change in the law.

§ 4: Procedurally Defaulted Claims

This Section removes the question of "cause and prejudice" and, except in cases of actually innocent defendants, retains the requirement that the state prisoner present his federal claims to the state courts.

It also resolves an important legal issue. Earlier I explained the importance of the long-standing and basic legal principle that an attorney must first give the trial judge an opportunity to correct a legal decision or forfeit the right to have a higher court review it. Most jurisdictions, including the federal courts, have developed a procedure as an exception to the Contemporaneous Objection Doctrine where in rare circumstances that are extraordinary the courts will consider a legal issue not presented in the trial court. Courts refer to this as "fundamental error" or "plain error" review. As a society, we want the first level appellate courts to do such review, because if a major error occurred without objection, it can be corrected close-in-time to the main event. The same policy considerations support another part of this section concerning properly filed applications. If a state court makes an exception in a unique case because of the special

circumstances in order to do justice, that should not change state law for purposes of habeas review.

Fearing that fundamental error review would open the flood-gates to federal review of state convictions, the Arizona legislature changed the law so courts are no longer required to engage in such review. The section clarifies that such review does not exhaust a constitutional claim, unless the state prisoner is actually innocent. Of course, had the state court found the claim meritorious, there would be no need for federal review, the case would have been sent back. If the state court found the claim wanting, in most cases one would expect the federal court to agree.

The Section also overturns decisions out of the Ninth Circuit concerning what is an "ambiguous" state order. Although from the state-court record it was clear what federal claims had been presented in the direct appeal and what claims had not been, the Ninth Circuit claimed the state court order was ambiguous. The state court had used stock language that the claims were precluded because they had either been previously presented or could have been, the Ninth Circuit treated all the constitutional claims as if the state court had had an opportunity to address them.

Enactment of this section would clear out much of the procedural underbrush and focus the federal courts on those constitutional claims that the state courts had a fair opportunity to address and on actual innocence.

§5: Tolling of Limitation Period

This section clarifies that the only exceptions to the statute of limitations are those that Congress authorizes. It only permits tolling when a state prisoner is presenting a federal claim to the state courts. It would also overrule the Supreme Court's *Carey v. Scaffold* decision by excluding from tolling the time a post-conviction relief petition is between courts.

§6: Harmless Error in Sentencing

This section provides a very significant change because it essentially removes from the federal habeas courts constitutional claims related to sentencing. This section has nothing to do with the question of guilt or innocence. The policy question is whether federal habeas courts should be involved in state subjective discretionary sentencing decisions. With the exception of death penalty cases, virtually all would agree that those types of decisions do not require federal oversight.

This does not mean a defendant cannot have constitutional review of his sentence. The recent Sixth Amendment decisions concerning jurors deciding elements that made a defendant eligible for a certain sentence all

arose from direct review, not habeas. *E.g. Apprendi v. New Jersey*, *Ring v. Arizona*. The cases concerning the constitutionality of the death penalty were also direct review cases. *E.g. Furman v. Georgia*, *Profitt v. Florida*. The same is true for capital jury instruction cases. *E.g. California v. Ramos*. And for ineffective assistance of counsel. *E.g. Strickland v. Washington*. Thus, this section does not affect the federal courts ability to *uniformly* interpret the constitution in matters that could influence sentencing; it only restricts that ability to the Supreme Court. That restriction is appropriate, because that is the *only* federal court superior to the states' highest courts.

With death penalty cases, it is too easy for a federal court not to accord proper deference to a state's decision to have a death penalty. The strong policy reasons of comity and finality, support Congress removing this issue from the habeas courts.

§§ 7 & 14: Unified Review Standard

Although almost a decade has elapsed since Congress enacted the AEDPA, I still have several pre-AEDPA cases pending in federal court. At this point in time, all habeas petitioners should be reviewed under the same procedures.

§8: Appeals

This Section would speed the appellate decision process with reasonable time periods. If a person is in custody in violation of the Constitution, his rights should be vindicated as quickly as possible.

§9: Capital Cases

This section would make it easier for states to take advantage of the AEDPA's opt-in provisions.

§10: Clemency and Pardon Decision

This section clarifies that a federal habeas court has no role to play in a state executive clemency proceeding. In death cases, such proceeding are often used to trigger a last round of appeals having nothing to do with the guilt or innocence of the state prisoner.

§ 11: Ex Parte Funding Requests

This provision allows the public to know the amount of funds being expended at this narrow review stage of the criminal justice system while protecting the attorney-client privilege.

The remaining sections do not appear to be in controversy.

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July 12, 2005

Via Facsimile

The Honorable Arlen Specter
United States Senate
Chair, Committee on the Judiciary
711 Hart Senate Office Building
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S. 1088, Streamlined Procedures Act of 2005

Dear Senator Specter:

I write to add my voice to the growing number of individuals and institutions who have expressed grave concern regarding the recently proposed *habeas corpus* amendments embodied in Senate Bill 1088, the so-called "Streamlined Procedures Act of 2005." As a private attorney in a large corporate law firm, I spend the majority of my time litigating cases involving major financial institutions and Fortune 500 companies. However, as a lawyer with substantial experience litigating *habeas corpus* cases on behalf of indigent clients on a *pro bono* basis, I can tell you that the bill currently under consideration will do nothing to "streamline" *habeas* litigation in this country. To the contrary, it is my considered judgment that the numerous flawed provisions of the bill will only serve to generate further confusion and delay in an area of law that already baffles and confuses the most experienced of counsel – not to mention

My experience in death penalty cases in Alabama, Texas, and other parts of the country has shown me that there are significant flaws in the administration of justice – flaws which this bill will at best mask, or at worst, exacerbate. A pivotal study released in 2000 demonstrated what we practitioners had known for some time: the error rate in capital cases is unacceptably high. *See* James S. Liebman et al., "A Broken System: Error Rates in Capital Cases: 1973-1995," (2000). With reversal rates in capital cases reaching as high as nearly 70%, how can anyone doubt that federal judicial oversight is an essential check in our valued system of justice? Yet the underlying assumption suffused throughout Bill 1088 is that the state court criminal justice system is working fine and requires only minimal, if any, federal *habeas corpus* review. The objective evidence demonstrates that this simply is not true.

To give you but one example that is representative of a vast array of both major and minor injustices that routinely occur in capital cases all over the country: I represent an inmate on death row in Alabama, whose state postconviction review claims were summarily dismissed, without any discovery or opportunity for a hearing, by a judge who didn't even bother to alter a single word, or omit references to "opposing counsel," from the State's proposed order before he signed it. This same judge relied in that opinion on sworn affidavits submitted by the State to which my client was never afforded any opportunity to cross examine. Then, to add insult to injury, the clerk of the court failed to send any notice of the Judge's ruling to my office; indeed, the first we heard of the ruling (despite routine checks of the docket sheet) was six months later, when the State Attorney General's office called to tell us they were setting an execution date for our client (who was, by the way, a juvenile at the time of his crime and therefore could have been executed long before the Supreme Court's recent decision in Roper v. Simmons, 125 S. Ct. 1183 (2005)).[1] (The clerk later backdated the opinion on the court's official docket sheet, in an apparent attempt to hide the mistake).

Had Bill 1088 been in effect at the time, the result would have been an embarrassment to the institution of law. For one, because we never (through no fault of our client's or our own) received notice of the judge's ruling, we would have been time-barred from taking our client's meritorious claims to federal court. So, even though the state court judge utterly abdicated his responsibility to act neutrally and to provide our client a full and fair hearing, his decision would have marked the final word on the life or death of a boy who was only seventeen years old when he committed his first and only criminal offense.

As this example illustrates, not only is Bill 1088 likely to effectuate and mask gross injustices, it is highly *unlikely* to succeed in accomplishing its purported

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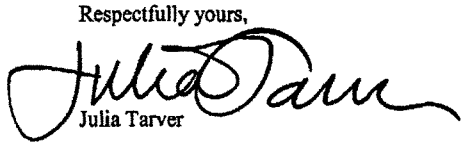
[1] Shockingly, the failure to notify habeas petitioners of relevant rulings in their cases is such an acknowledged problem in Alabama that it has generated several appellate court opinions addressing the issue, and ultimately resulted in amendment of Alabama's Rule 32 procedures to cover the eventuality. *See, e.g.*, Marshall v. State, 884 So.2d 900 (Ala. 2003); Fountain v. State, 842 So. 2d 719 (Ala. Crim. App. 2000); Ala. R. Crim. Procedure 32.1(f).

objective of "streamlining" *habeas corpus* cases. Instead, it will generate further confusion and uncertainty in an area of the law that is already the subject of constant litigation and review. For these reasons, among others, my experience leads me to conclude that the proposed amendments embodied in Bill 1088 will make cases like mine much more complicated, will create unnecessary litigation, and will have the effect of slowing down the appeals process rather than streamlining it.

As a former intern with this Committee, and as a person with great belief in your desire and capacity to do the "right" – not just the "political" – thing, I strongly urge you to slow down and take a closer look at Senate Bill 1088. It would be a certain black mark on this Committee's longstanding commitment to fairness to undo with one bill the "Great Writ" it has taken this country over a century to develop.

Respectfully yours,



Julia Tarver

cc (via facsimile): The Honorable Patrick J. Leahy
The Honorable Orrin G. Hatch
The Honorable Edward M. Kennedy
The Honorable Charles E. Grassley
The Honorable Joseph R. Biden, Jr.
The Honorable Jon Kyl
The Honorable Herbert Kohl
The Honorable Mike DeWine
The Honorable Dianne Feinstein
The Honorable Jeff Sessions
The Honorable Russell D. Feingold
The Honorable Lindsey Graham
The Honorable Charles E. Schumer
The Honorable John Cornyn
The Honrable Richard J. Durbin
The Honorable Sam Brownback
The Honorable Tom Coburn
The Honorable Hillary Rodham Clinton

washingtonpost.com

Stop This Bill

Post
Sunday, July 10, 2005; B06

CONGRESS HAS a novel response to the rash of prisoners over the past few years who have been exonerated of capital crimes after being tried and convicted: Keep similar cases out of court. Both chambers of the national legislature are quietly moving a particularly ugly piece of legislation designed to gut the legal means by which prisoners prove their innocence.

Habeas corpus is the age-old legal process by which federal courts review the legality of detentions. In the modern era, it has been the pivotal vehicle through which those on death row or serving long sentences in prison can challenge their state-court convictions. Congress in 1996 rolled back habeas review considerably; federal courts have similarly shown greater deference -- often too much deference -- to flawed state proceedings. But the so-called Streamlined Procedures Act of 2005 takes the evisceration of habeas review, particularly in capital cases, to a whole new level. It should not become law.

For a great many capital cases, the bill would eliminate federal review entirely. Federal courts would be unable to review almost all capital convictions from states certified by the Justice Department as providing competent counsel to convicts to challenge their convictions under state procedures. Although the bill, versions of which differ slightly between the chambers, provides a purported exception for cases in which new evidence completely undermines a conviction, this is drawn so narrowly that it is likely to be useless -- even in identifying cases of actual innocence.

It gets worse. The bill, pushed by Rep. Daniel E. Lungren (R-Calif.) in the House and Jon Kyl (R-Ariz.) in the Senate, would impose onerous new procedural hurdles on inmates seeking federal review -- those, that is, whom it doesn't bar from court altogether. It would bar the courts from considering key issues raised by those cases and insulate most capital sentencing from federal scrutiny. It also would dictate arbitrary timetables for federal appeals courts to resolve habeas cases. This would be a dramatic change in federal law -- and entirely for the worse.

The legislation would be simply laughable, except that it has alarming momentum. A House subcommittee held a hearing recently, and the Senate Judiciary Committee is scheduled to hold one and then mark up the bill this week. Both Judiciary Committee chairmen surely know better. House Judiciary Chairman F. James Sensenbrenner Jr. (R-Wis.), after all, has fought for better funding and training for capital defense lawyers. And Senate Judiciary Chairman Arlen Specter (R-Pa.) has long opposed efforts to strip federal courts of jurisdiction over critical subjects. Neither has yet taken a public position on the bill. Each needs to take a careful look. It is no exaggeration to say that if this bill becomes law, it will consign innocent people to long-term incarceration or death.

Statement of Seth P. Waxman

Hearing on S. 1088 before the Committee on the Judiciary

United States Senate

July 13, 2005

Statement of Seth P. Waxman

I want to thank the Committee for inviting me to discuss S. 1088, which would amend various provisions of the statutes governing the federal courts' jurisdiction to entertain habeas corpus petitions filed by state prisoners. Since 1979, I have been involved in federal and state litigation, in private practice and for the United States Department of Justice. I have litigated habeas corpus cases since 1980, most recently *Miller-El* v. *Dretke*, which was decided last month by the Supreme Court of the United States.

I want to address my remarks to the profound—and in my view profoundly unfortunate—impact this bill would have on the justice system. S. 1088 would largely eliminate the federal courts' jurisdiction to adjudicate serious, consequential, federal constitutional claims raised by state prisoners. As such, it would constitute a fundamental break with our longstanding statutory and constitutional tradition. What is more, it would generate an entirely new wave of litigation of just the type that the federal courts are only now largely completing following the wholesale 1996 revision of federal habeas procedures in the Anti-Terrorism and Effective Death Penalty Reform Act (AEDPA). I am aware of no data demonstrating that the streamlining provisions of AEDPA have failed to accomplish their purpose. And if inefficiencies were shown to persist in the way habeas corpus petitions are processed in federal courts, there are forthright ways to address them. This bill goes far beyond any ameliorative correction, to curb the federal courts' authority to vindicate meritorious constitutional claims—in non-capital as well as capital cases.

I. The Substance of S. 1088

The title of this bill suggests that it would streamline the processing of habeas corpus cases. When I first picked it up, I expected to find procedural adjustments meant to eliminate inefficiency. I found something else entirely. Section after section of the bill would eliminate federal-court jurisdiction to decide federal questions in habeas corpus cases. The bill is not limited to new procedural rules for litigants or courts to follow *when* federal courts exercise their habeas corpus jurisdiction to decide questions necessary to a proper result. It contains jurisdictional prohibitions that would prevent federal courts from addressing crucial federal issues *at all*.

Section 2, for example, would direct a federal court to dismiss a federal constitutional claim "with prejudice" when, under current law, the court would postpone consideration of the claim until the state courts have had an opportunity to address it first. The import is clear: Section 2 would turn what is now a rule governing the *timing* of federal jurisdiction into a rule *eliminating* federal jurisdiction itself.

There are numerous other examples; I will briefly address three. Section 4 would expressly withdraw federal jurisdiction to examine claims state courts resolved on state procedural grounds. Casting aside the "cause and prejudice" standard crafted in 1977 by Chief Justice Rehnquist—a standard that has proven remarkably effective as a gatekeeper against constitutional claims that were resolved by a state court on adequate and independent procedural grounds—the bill would require federal courts to accept at face value a state court's decision that some procedural rule established an immutable requirement, that the prisoner failed to comply

with that requirement, and that in consequence, the state court declined to consider the claim. Indeed, the bill would eliminate jurisdiction even to consider a claim that the state court *did* proceed to consider on the merits, and claims that any "default" was due to legal representation that fell below the Sixth Amendment floor.

Section 6 would eliminate federal jurisdiction to examine almost all claims addressed to the constitutionality of a sentence. Any recitation by the state court that constitutional sentencing error appeared "harmless" or "not prejudicial" would entirely divest federal courts of jurisdiction—even to examine whether or not such a conclusion was manifestly incorrect. Since any state court that identifies a *non*harmless constitutional violation is required to provide relief, the effect of Section 6 is essentially to strip federal courts of jurisdiction to consider claims of constitutional error in sentencing—even in the case of death sentences challenged on the ground that the sentence imposed does not comport with the Eighth Amendment or was the direct consequence of constitutionally ineffective counsel, in violation of the Sixth Amendment.

Section 9, the most sweeping provision of all, would completely withdraw federal jurisdiction to consider virtually *all* claims in capital cases (whether addressed to conviction or sentence, and regardless even of whether the state court actually addressed the claims), provided the case arises from a state that the Attorney General of the United States certifies as providing legal counsel in postconviction proceedings.

S, 1088 recites exceptions to these wholesale jurisdictional prohibitions, and I will come to them in a moment. But the first order of business is to understand that these provisions would undercut the federal courts' ability to enforce fundamental federal constitutional rights. Only Section 9 would flatly *repeal* basic habeas jurisdiction (in death penalty cases). But the other sections would accomplish much the same purpose by withdrawing jurisdictional power to decide crucial issues *in* habeas corpus cases.

Stripping federal courts of jurisdiction in this way would come at an extremely high cost. We expect state courts to be sensitive to federal constitutional rights, and in the vast majority of cases of course they are. But under our constitutional tradition criminal cases—and especially those imposing capital punishment—require special care and review procedures that minimize the incidence of constitutional error. That is why we have a long tradition of ensuring that prisoners with federal claims have an opportunity to present those claims to federal courts as a necessary safeguard in those rare cases in which constitutional violations that are not corrected in state court. I urge this Committee to think long and hard before it approves legislation that would dilute that tradition of fairness and rationality in our constitutional system.

Now to the exceptions. The principal safety valve relates to so-call "actual innocence," and on first blush, you might think that S. 1088 relaxes jurisdictional prohibitions in circumstances in which a prisoner's factual guilt may be in doubt.[1] But on closer examination,

[1] The other exception frequently referenced in the bill is for "a new rule of law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" (*e.g.*, Section 2 (incorporating 28 U.S.C. § 2254(e)(2)). But since 1989, when the Supreme Court first gave effect to that standard, the Court has never given a "new" procedural rule retrospective effect.

the "innocence" exception is far more circumscribed, because, with inconsequential exceptions, the bill would require that any prisoner who asserts that he or she is innocent demonstrate: (1) that the claim rests on a factual predicate that "could not have been previously discovered through the exercise of due diligence"; (2) that the underlying facts "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty"; *and* (3) that a denial of relief on the basis of the claim would be "contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." It's hard to think that any prisoner would be able to make all those showings. The new evidence establishing innocence might have been discoverable earlier; or that evidence might not clearly and convincingly persuade every reasonable judge or jury; or it might not be unreasonable to reject the constitutional claim itself (apart from any evidence of actual innocence). A genuinely innocent prisoner, then, may well be denied even review by a federal court.

As I mentioned earlier, Congress enacted comprehensive reform legislation in this field about ten years ago. At the time, I was responsible for coordinating much of the Department of Justice's views and comments on AEDPA, which we supported and which established extremely high thresholds for obtaining federal habeas corpus relief. Even AEDPA, however, did not withdraw federal-court *jurisdiction* to act in circumstances that warrant habeas corpus relief. It would be a serious mistake to do so now—particularly since, to my knowledge, no one has persuasively established that AEDPA has failed in any systemic way to resolve the inefficiencies in federal-court review that prompted its enactment.

II. Illustrations of Affected Cases

My concern about the profound effects S. 1088 would have stems not just from tradition or constitutional theory. It is not based solely on concerns about the wisdom of wholesale jurisdictional revision in the absence of data identifying any continuing systematic problem. Rather, I am concerned principally about real-world consequences, and my concern is based on real-world experience. We do not have to imagine instances in which federal habeas corpus jurisdiction is essential to the preservation of fundamental rights. Even under AEDPA's restrictive regime, we have real illustrations—habeas corpus cases in which serious constitutional violations went uncorrected until federal habeas corpus review. Consider four recent cases in which substantial majorities of the Supreme Court found egregious constitutional violations that had been overlooked by state courts. Were S. 1088 the law, the federal courts would not even have had *jurisdiction* to review the meritorious constitutional claims.

Miller-El v. *Dretke*, 73 U.S.L.W. 4479 (2005)

Only a few weeks ago, in *Miller-El*, a six-member majority of the Supreme Court concluded that the Equal Protection Clause mandated habeas corpus relief because the prosecutors at petitioner's state murder trial had deliberately skewed the jury-selection process in a racially discriminatory manner—conducting *voir dire* with the purpose and effect of systematically eliminating African Americans. The petitioner had pressed that same claim

previously in state court, but the state courts had denied the claim because the prosecutors offered race-neutral explanations for their actions.

The Supreme Court recognized that AEDPA requires any federal court entertaining a habeas corpus petition (including the Supreme Court itself) to presume the accuracy of state-court findings of fact. To overcome that presumption, the petitioner must prove by "clear and convincing evidence" that the state-court findings were wrong, and indeed that the state courts' decision was based on an "unreasonable" determination of the facts. The threshold for obtaining relief in *Miller-El* was therefore extraordinarily high in light of existing federal statutes (which, of course, remain in place today). Yet six Supreme Court Justices concluded that the evidence of deliberate, unconstitutional race discrimination was so overwhelming that the Constitution simply would not permit the conviction to stand.

That evidence showed that prosecutors had struck ten of the eleven African Americans who were qualified to sit on the jury, even as they failed to strike whites who could be distinguished from African Americans only on the basis of race. The evidence also showed that the prosecutors questioned African Americans, but not whites, using techniques designed to trick them into statements that might be the basis for exclusions for cause. They described executions in lurid detail to African Americans, but not whites, again hoping that blacks would be troubled and reveal some basis for being excused. They insisted on shuffling the seating of veniremen when it appeared that African Americans were next in line to be considered. And they took their cues from a manual (no longer formally a matter of policy) explaining that African Americans should be kept off juries whenever possible. All this evidence established a case of race discrimination that prosecutors were completely unable to explain away.

The Committee should understand that habeas corpus exists for cases like *Miller-El*, in which serious, consequential violations of federal constitutional rights corrupt a criminal trial but are not corrected in state court. AEDPA has already set the bar very high, allowing only egregious cases like *Miller-El* to succeed. This new bill, S. 1088, would set the stage for frustrating justice in those very cases. Several of the provisions in this bill might foreclose federal court action in a given case, depending upon the circumstances. But certainly Section 9 would have a devastating effect. Under that section, a federal court would have no jurisdiction even to address the kind of claim that the petitioner in *Miller-El* advanced (if the case arose from a state certified by the Attorney General to supply counsel in state postconviction proceedings).

Banks v. *Dretke*, 124 S. Ct. 1256 (2004)

Last year in *Banks* the Supreme Court voted 7-2 to upset a death sentence and directed the lower courts to review an equally troubling constitutional question regarding the underlying conviction. The record before the Court showed plainly that: (1) the state's two essential witnesses lied repeatedly to the jury—one at the guilt phase of the trial and the other at the sentencing hearing; (2) state prosecutors assured the jury and the court that those witnesses were telling the truth; (3) those prosecutors also assured defense counsel that all relevant materials had been disclosed; and (4) the prosecutors persisted in those representations throughout the process in state court. In state court the petitioner was unable to prove that the prosecutors had in fact

suppressed a wealth of information that would have demonstrated that the state's witnesses were lying. The truth came out only in federal habeas corpus proceedings.

Had S. 1088 been in place, none of this disturbing, prejudicial prosecution misconduct would have come to light—for the simple reason that the prosecutors kept the critical information away from the state courts and this bill would have eliminated federal habeas corpus review. Neither claim in *Banks* had been fully presented fully to the state courts, and Section 2 would have required a federal court to dismiss them with prejudice. Neither claim would have fit within the extremely narrow exception that Section 2 would allow. Independently, Section 3 of the bill would have barred the claim going to the conviction in *Banks*. The petitioner did not secure evidence to support that claim until the federal petition had been pending for more than a year. It was only at that point that a federal magistrate ordered the state to make crucial evidence available and thus put the petitioner in a position to amend his petition. Finally, Section 9 certainly would have foreclosed federal habeas corpus in *Banks*—if the state had supplied counsel in state postconviction proceedings under a system satisfactory to the Attorney General.

The *Banks* case illustrates the way in which prosecutorial misconduct can undercut the integrity of state-court processes without the knowledge of state courts. The only safeguard to address that kind of behavior is federal habeas corpus.

Wiggins v. *Smith*, 123 S. Ct. 2527 (2003)

In *Wiggins*, a seven-member majority of the Supreme Court held that the petitioner's lawyers rendered ineffective assistance of counsel at the sentencing phase of his capital trial, in violation of the Sixth Amendment. There too the state's highest court had rejected that very claim on the merits. Accordingly, when the case reached the Supreme Court by way of a habeas corpus petition, AEDPA barred relief absent an extraordinary showing: the petitioner had to satisfy the Supreme Court that "clear and convincing evidence" established that the findings of fact in state court were erroneous; that the state-court decision against the petitioner was based on an "unreasonable" determination of the facts; *and* that the ultimate state-court decision rejecting the Sixth Amendment claim was not only wrong, but "objectively unreasonable."

Writing for the Court, Justice O'Connor explained that in this exceptional case all three of those tests were met. The petitioner was facing a death sentence. The jury was entitled to hear evidence regarding his childhood that might warrant mercy. Yet his attorneys presented no evidence regarding his life history at all. That history reflected numerous facts mitigating the petitioner's responsibility—facts the Court described the story as "excruciating." The petitioner's mother was an alcoholic who regularly beat him, left him alone for days without food, and on one occasion pressed his hand against a hot stove burner. Shuttled among various foster homes, he was repeatedly sexually molested and raped.

The defense attorneys could not explain their failure to investigate these matters and present them to the jury. They contended that they had made a tactical judgment *not* to ask the jury for mercy but, instead, to convince the jury that the petitioner had not actually killed the victim—notwithstanding that he had just been convicted of that offense (in a trial to the judge).

The Supreme Court found it plain that the lawyers had looked no further than a few court records, failed to commission a social worker to fill out the record, and also failed themselves to investigate and evaluate the mitigating evidence available. They simply had failed to take the minimal steps necessary to identify evidence that would have been crucial to any genuinely informed choice whether or not to use the sentencing proceeding as an opportunity essentially to re-try the question of guilt.

If S. 1088 is enacted, Section 9 would completely deprive federal courts of jurisdiction in cases like *Wiggins*—if the relevant state satisfies the Attorney General that it supplies effective lawyers in state postconviction proceedings. At best, the idea seems to be that if lawyers are provided to handle cases at the postconviction stage in state court, federal habeas corpus is unnecessary. That is not at all necessarily the case. Cases like *Wiggins* show that quality representation is needed primarily at the original trial and sentencing stages of the state process. Unfortunately, many states do not provide effective attorneys when they are most needed. And even if better representation is provided later in postconviction proceedings, the damage has already been done.

Cases like *Wiggins* demonstrate, moreover, that even excellent representation in state postconviction proceedings does not ensure that state courts will always reach even reasonable decisions on the merits of federal constitutional claims. The evidence regarding the petitioner's life history was developed by new lawyers who represented him at the state postconviction stage. Those lawyers did the job that the attorneys at the sentencing stage had not. Still, the state courts failed to recognize a violation of the petitioner's Sixth Amendment rights—an oversight that fully seven members of the Supreme Court determined to be not just error, but an "unreasonable application of clearly established law."

***Lee* v. *Kemna*, 534 U.S. 362 (2002)**

In *Lee*, another six-member majority of the Court held that state courts had unjustifiably declined to consider a claim that a petitioner had been denied due process of law when the trial judge refused to give him time to find alibi witnesses who had disappeared from the courthouse. Local rules of procedure required that a request for a continuance must be in writing and, since the petitioner's lawyer presented his request orally (without objection on this ground by the prosecution or comment by the trial judge), the state appellate court held that he had committed "procedural default" making it unnecessary to address his federal constitutional claim.

Defense counsel in *Lee* had arranged for members of the petitioner's family to appear and explain under oath that he had been with them in California at the time the offense in question had been committed in Missouri. Those witnesses were in court when the trial began, sequestered and under subpoena, but they left after being told (apparently by a representative of the state) that they would not be needed until the following day. That afternoon, when defense counsel called them to the stand, he was surprised by their absence and immediately requested a brief continuance so that he could locate them. The trial judge did not rely on the rule requiring requests to be in writing, but said that it would be inconvenient to postpone matters until the

following day because he meant to visit his daughter in the hospital. The trial continued without the alibi witnesses, and the petitioner was convicted.

The Supreme Court recognized that, under its precedents, a federal court entertaining a habeas corpus petition usually cannot consider a claim that was not presented to the state courts in accordance with state procedural rules. But in this case, it was clear that the state courts had no *adequate* basis for refusing to address the prisoner's claim. It was arbitrary, the Supreme Court held, to deny even a short continuance to find alibi witnesses who had mistakenly left the room—witnesses who might well establish that the defendant was not guilty. In *Lee*, moreover, the prosecution relied on eyewitnesses who did not know the defendant well—the kind of testimony that juries tend to believe but that professionals know is notoriously unreliable. The Court thus understood that the state courts had denied a continuance that might have allowed an innocent man to avoid conviction and had given a weak procedural reason for refusing to consider his claim that he had been denied a fair trial.

Cases like *Lee* illustrate how federal habeas corpus is essential in some cases to identify circumstances in which arbitrary state-court behavior can *both* violate due process *and* potentially insulate unfair or erroneous convictions from review in federal court. The prisoner in *Lee* had to clear a high hurdle; he had to establish that the state's reason for declining to treat his due process claim was inadequate. But he met that high burden.

Had S. 1088 been enacted, the result in *Lee* would have been completely different. Section 4 would strip federal courts of jurisdiction to consider a claim that a state court declined to entertain on the basis of some procedural error committed by the prisoner or his lawyer in state court—even if, as was the case in *Lee* and *Osborne* v. *Ohio*, 495 U.S. 103 (1990), the asserted procedural rule was nothing more than a "formal 'ritual'" that "'further[s] no perceivable state interest." Under Section 4 a federal court would have to accept at face value a state court's decision that a state rule established a procedural requirement, that the prisoner or his attorney failed to comply with that requirement, and that, in consequence, the state court declined to consider the prisoner's federal claim. The only exceptions would be for prisoners whose claims rest on "new rules" of law that have retroactive effect or on an overwhelming demonstration of actual innocence based on facts that could not have been discovered previously. Under Section 4, federal constitutional claims like the claim in *Lee* would go without consideration in either state or federal court, irrespective of their merit and irrespective of their bearing on prisoners' guilt.

III. A Better Way

Over the last ten years, the Supreme Court and the lower federal courts have struggled with the provisions of AEDPA, attempting to smooth out the wrinkles so that habeas corpus cases are handled efficiently. Perhaps it is time to stand back, take stock of how AEDPA has fared, and respond to any deficiencies the courts have been unable to address. To my knowledge, that has not been done—certainly not in any objective, systematic way. Instead, S. 1088 adopts a blunderbuss approach to problems that may not even persist—eliminating rather then streamlining the exercise of federal habeas corpus jurisdiction.

There is a far better way to proceed. The Judicial Conference of the United States, the Administrative Office of United States Courts, the Federal Judicial Center, and other institutions *exist* for the purpose of solving problems arising in the judicial branch. I urge the Committee to take advantage of those good offices rather than enacting jurisdiction-stripping legislation on an inadequate record.

Specifically, the Committee should begin by getting the facts straight. We know that some death penalty cases have taken years to resolve, but we do not know why or, more importantly, whether delays in some cases represent a pattern in the system. Good data should be developed to identify any systemic inefficiencies that actually persist. Once that data is assembled, the Committee should work with the Judicial Conference and other institutions and organizations to evaluate it, identify genuine problems, and prepare targeted measures that address the identified problem while minimizing unintended consequences. If the data reveal systemic delays in the federal courts' adjudication of habeas cases, forthright steps can be taken to accelerate the process. Legislation of that kind might produce greater efficiency, something that everyone should want. By contrast, S. 1088 would compromise the federal courts' jurisdiction to perform their vital function in our constitutional system—the enforcement of fundamental constitutional rights in cases like *Miller-El*, *Banks*, *Wiggins*, and *Lee*.

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VIA FACSIMILE

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Senator Specter:

We are partners in the law firm of White & Case. We write to express our personal concern about the precipitous action the Senate Judiciary Committee, and possibly the Senate itself, may take by reporting out the recently proposed habeas corpus amendments. We are litigators, having practiced in state and federal courts across the country, primarily defending corporate clients in major, complex civil litigation. Mr. FitzPatrick has practiced law for over 35 years and Ms. McDevitt for almost 12 years. We also have represented an indigent convicted prisoner who is sentenced to death in both state post-conviction proceedings and now federal habeas corpus proceedings on a part-time, pro bono basis for the last fourteen years.

We undertake this representation, which can be very time consuming, because of our concern that over-burdened and understaffed public defenders often do not have the time and resources to effectively represent their clients in the (similarly) understaffed and overburdened state judicial systems. While our observations have been that public defenders and judicial offices are, in the main, dedicated and honest public servants, we also have observed that, all too often, indigent capital defendants often fail to receive the due process guaranteed all citizens charged with serious crimes.

Our experiences over the years bear out our concerns. We are well acquainted with the state post-conviction and federal habeas systems. While the proposed legislation seems to presume that state post-conviction proceedings provide an adequate procedural safeguard, our experience has shown that they often do not. In fact, we personally have found the opposite to be true. Hearings are limited and state post-conviction judges often are subject to extreme political and community pressures. Moreover as happened in the case we have been handling the ultimate factual "findings" and legal conclusions are drafted by the state attorney general and adopted wholesale by the state post-conviction court (which in turn forms the factual bases for further

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state post-conviction review). These are commonplace occurrences. The last bastion for correcting these miscarriages of justice is the federal habeas corpus court.

As you undoubtedly know, the amendments to the habeas statute in the 80's and 90's have already significantly curtailed access to the federal courts for habeas petitioners. Further curtailment would be unwarranted and unwise.

We urge your committee to proceed with due caution and deliberation in considering the proposed amendments. The continued necessity of federal habeas jurisdiction is clear to practitioners such as ourselves and any change to the system as it currently stands warrants careful and deliberate study and analysis.

We would be pleased to answer any questions you or the committee may have.

Sincerely yours,

Vincent R. FitzPatrick, Jr.

Heather K. McDevitt

VRFJ:sp

cc: The Honorable Patrick J. Leahy (by facsimile)
The Honorable Charles Schumer (by facsimile)

Second, if there are in fact instances of serious delay caused by real abuse of federal habeas, we need to ask if there is a systemic problem, or just a few isolated instances. Habeas corpus has protected the constitutional rights and freedoms of all Americans throughout our history. That is a vital protection that all Americans rely on. Let's not rush to dismantle it based on a few anecdotes about delay.

We must also bear in mind that a great deal of time has been spent litigating over the precise meaning of AEDPA's complex array of time limits and procedural bars. Those questions, which reflect the poor drafting of the law itself and not any abuse of habeas, are now largely resolved. Indeed, it is only in the last couple of years that the appellate courts have clarified the rules under AEDPA sufficiently to start generating information about how the law is actually working in practice.

What has really changed since AEDPA's enactment? Since 1996, we as a Committee have joined with the rest of the Congress and the Nation as a whole in taking a closer look at the realities of state criminal justice systems. And that closer look led us to a further consensus. Last October, President Bush signed into law the Innocence Protection Act of 2004 -- a package of criminal justice reforms aimed at reducing the likelihood that an innocent person would be executed. Congress passed this landmark legislation with overwhelming bipartisan support, including the strong support of Chairman Specter, former Chairman Hatch, and Senator DeWine.

It is important to remember why we joined together on the IPA, and why we must continue to work together to ensure that its funding promises do not go unfulfilled. The IPA reflects what we learned about the administration of the death penalty over years of hearings in this Committee. We learned that there is an unconscionably high rate of error in capital cases -- error so serious that it not only denies defendants their constitutional rights but also undermines the reliability of the verdict. We learned of sleeping lawyers, drunk lawyers, suspended lawyers, and lawyers too overworked, underpaid, inexperienced, or indifferent to meet with their clients or conduct even the most cursory investigation. Most troubling, we learned of the more than 100 people who have been released from death row with evidence of their innocence.

The modern miracle of DNA testing has revealed what, because of its limited scope, can only be the tip of the iceberg, but that tip is tragically vast. Since the enactment of AEDPA in 1996, post-conviction DNA testing has cleared more than 150 wrongfully convicted individuals, including a dozen who had been sentenced to death.

A few of these individuals are here today, and I would like to welcome them:

- **Kirk Bloodsworth** was a young man, just out of the Marines, when he was arrested, convicted, and sentenced to death for a heinous crime that he did not commit. DNA evidence ultimately freed him and identified the real killer. I am proud to have come to know him and his wife, Brenda, through our work together on the Innocence Protection Act, which includes a program named in his honor.